

1       IN THE CIRCUIT COURT OF THE STATE OF OREGON  
2               FOR THE COUNTY OF MULTNOMAH

3   The Estate of JESSE D.           )  
   WILLIAMS, deceased, by and    )  
4   through MAYOLA WILLIAMS,       )  
   personal representative,       )  
5                                    )  
      Plaintiff,                    )  
6                                    )  
      vs.                            )   No. 9705-03957  
7                                    )  
   PHILIP MORRIS INCORPORATED,    )   Afternoon Session  
8                                    )  
      Defendant.                    )   Volume 15-B

9  
10               TRANSCRIPT OF PROCEEDINGS

11       BE IT REMEMBERED that the above-entitled  
12   matter came on regularly for jury trial before the  
13   Honorable Anna J. Brown, Judge of the Circuit Court  
14   of the County of Multnomah, State of Oregon, on  
15   Friday, March 12, 1999.

16  
17               APPEARANCES  
18       Raymond Thomas, James Coon,  
      William Gaylord and Charles Tauman,  
19       Attorneys at Law,  
      Appearing on behalf of the Plaintiff;

20  
      James Dumas, Walt Cofer, and Billy Randles,  
21       Attorneys at Law,  
      Appearing on behalf of the Defendant.

22  
23               Dennis Apodaca  
      Official Court Reporter  
24       556A Multnomah County Courthouse  
      Portland, Oregon 97204  
25       248-3180

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GLENN MAY

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FOR THE PLAINTIFFS:

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83

Friday, March 12, 1999

P R O C E E D I N G S

(Open court; jury  
present:)

THE COURT: Good afternoon, jurors.

THE WITNESS: Good afternoon.

THE COURT: Ready to continue with the  
direct examination, Mr. Randles?

MR. RANGLES: Thank you, Your Honor.

DIRECT EXAMINATION

(Resumed)

BY MR. RANGLES:

Q. Professor May, we're about to move to the  
1964 Surgeon General's Report. Before we do that,  
I wanted to ask you, you talked about the number  
of stories, or you gave some examples of stories  
in the newspaper about the health risks of smoking  
in the 1950s and the early 1960s. I wanted to ask  
you, was there a difference between the amount of  
coverage you saw in the newspapers in the 1950s  
and the 1960s about the health risks of smoking

1 compared to what one might see today?

2 A. Oh, yes. Yes. Quite considerable  
3 difference, in that nowadays I think all of us are  
4 absolutely convinced that by the  
5 scientific evidence. Scientists, in my view,  
6 appear to agree that cigarette smoking causes lung  
7 cancer, so it is not any big news.

8 There are further studies. There are  
9 further studies that add some details to this  
10 picture that come out. They come up in the press.  
11 But it is not the big furor that it was in the  
12 '50s and '60s. The amount of coverage was pretty  
13 overwhelming on those particular issues having to  
14 do, above all, with cancer, heart disease,  
15 mortality. That's sort of news.

16 Q. Professor May, regarding the 1964 Surgeon  
17 General's Report, these jurors have heard a lot  
18 about it, so I don't think we need to get into the  
19 exact circumstances surrounding it.

20 But when the Surgeon General's Report  
21 came out in 1964 with its findings that cigarettes  
22 were causally linked to lung cancer in men, was it  
23 big news?

24 A. Oh, it was a big story, covered  
25 nationally, and it was a front page story.

1 In The Oregonian, it was a first-page story.  
2 Around the world, really even beyond the U.S --  
3 the U.S. was a major player of all that, of the  
4 first-page story. Once more, throughout the month  
5 of January, it was covered again and again.

6 When one finds -- I think -- I found  
7 30-plus stories in the month of January '64 having  
8 to do with the health risks of smoking. And in  
9 some years you might not have that many, as many  
10 as that, as 30-something-odd stories.

11 Q. Did you bring some examples for us of  
12 some of the coverage?

13 A. I did.

14 Q. With the Court's permission, would you  
15 step around by that screen?

16 THE COURT: Go ahead.

17 BY MR. RANGLES:

18 Q. I want to ask you if a couple of these  
19 are a couple of examples of the coverage?

20 A. That's definitely not the coverage.

21 Q. Perhaps not.

22 MR. RANGLES: With the Court's  
23 permission, I will let my more technological  
24 competent colleague look at the computer while I  
25 proceed. And we may come back to it.

1           Were there a number of stories in the  
2     popular press about the Surgeon General's Report  
3     throughout 1964?

4       A.    Oh, yes, there were.

5           I can do this to music as well,  
6     apparently.

7       Q.    There was some testimony in this case  
8     that it was maybe a big story for maybe a couple  
9     of days and then faded away. Would you agree with  
10    that assessment?

11      A.    Oh, no, no. It was a huge story. I  
12     can't remember, I saw something recently, I don't  
13     know if it was in some magazine -- People  
14     Magazine, or whatever -- they were looking at the  
15     biggest stories of the past 50 years or so. This  
16     is one of the top 100. So it was big news. There  
17     was so many smokers. More than half adult  
18     Americans smoked. That's why it is big news.

19      Q.    Let me offer you some examples. Can you  
20     tell me -- here is one.

21           Is this a story in Time Magazine at the  
22     time discussing the Surgeon General's Report?

23      A.    Yes, it is. I wish I could read the day.  
24     But Time went to bed -- is that what they talk  
25     about in the news people? It goes to the -- the

1 press at a certain point, and as it went to the  
2 press, the story was just breaking. So it was  
3 about a week before Time covered it. It didn't  
4 mean that Time didn't think it was important. It  
5 had already gone to bed, gone to press.

6 In any event, it was a big story in Time  
7 Magazine. There was Surgeon General Luther Terry  
8 with a copy of the report -- actually, you saw a  
9 copy of it before with the Counterblaste, and  
10 pictures like this appeared around the U.S. and  
11 around the world.

12 Q. Perhaps if you could just show a couple  
13 of examples from The Oregonian.

14 A. Yes. First page, "Report links cigarette  
15 use with cancer."

16 Q. Is this another example?

17 A. Yes. "It's official now: Cigarettes can  
18 kill you." That's later in the month, too. It is  
19 the 28th of January. So -- and the message being  
20 sent was, "Now your government is telling you that  
21 it can kill you."

22 Q. In response to the Surgeon General's  
23 Report, was there an increase in anti-smoking  
24 organizations' activity levels in the state of  
25 Oregon?

1           A.    Oh, yes, absolutely.  There was just a  
2 mammoth amount of activity, as you might imagine.  
3 For example, school superintendents were telling  
4 teachers that they needed to get on the case right  
5 away.  There were television shows about it,  
6 public television, but also regular television.  
7 Lots of organizations were popping up,  
8 anti-smoking clinics all over the place with lots  
9 of people streaming into them after seeing it  
10 being covered in the press.

11          Q.    Have you seen any evidence that  
12 Mr. Williams was aware of the Surgeon General's  
13 Report in 1964?

14          A.    Well, as I recall, in the deposition of  
15 Mrs. Williams, there is a reference to their  
16 discussing the Surgeon General's Report.  I can't  
17 remember the exact wording.

18          Q.    Did there come a time in 1966 when the  
19 law required warnings to be placed on packages of  
20 cigarettes?

21          A.    That's correct, 1st of January, 1966.

22          Q.    Do you have some examples of the warnings  
23 with you?

24          A.    Yes, yes, I do.

25          Q.    Was this the first warning that was put

1 on in 1966?

2 A. That's correct. January 1st, 1966,  
3 "Caution: Cigarette smoking may be hazardous to  
4 your health." That went on all cigarette packages  
5 produced in the U.S.

6 Q. So did I understand your testimony  
7 correctly that this -- this warning and the  
8 subsequent warnings were required to be put on  
9 every package of cigarettes sold in the United  
10 States after this date?

11 A. That's correct.

12 Q. Did there come a time when the warning  
13 changed?

14 A. Yes. And it was strengthened somewhat, I  
15 would say. I think you have the example of the  
16 second warning. You will see three of these.

17 So 1970 to 1985, that time period, it  
18 says, "Warning: The Surgeon General has  
19 determined that cigarette smoking is dangerous to  
20 your health." So "Surgeon General has  
21 determined," not "may be." "Surgeon General has  
22 determined that cigarette smoking is dangerous to  
23 your health."

24 Q. Was this required to be placed on all  
25 cigarette packages sold in the United States

1 between 1970 and 1985?

2 A. That's correct.

3 Q. Did there come a time when the warnings  
4 changed again?

5 A. That's right, yes. And in this case,  
6 there was a determination to use multiple  
7 warnings.

8 Pardon me, I have to get a drink here.

9 Based on experience in Europe, it was  
10 determined that multiple warnings had --

11 Q. Professor, if I could. Let's not get  
12 into sort of the reasons for the change. Let's  
13 just talk about the warnings themselves.

14 A. Right. Thank you for keeping me on  
15 track.

16 This is rotational warnings on packages,  
17 four different warnings, October, 1985 to the  
18 present, and there were four different ones, which  
19 you can take a look at.

20 Q. The first one, does it read in part,  
21 "Surgeon General's warning: Smoking causes lung  
22 cancer," and lists other diseases?

23 A. That's right, it strengthens it further.

24 Q. Okay. And, again, implicit in what you  
25 said, did the law then require after October of

1 1985 that at least one of these four warnings be  
2 placed on every pack of cigarettes sold?

3 A. That's correct.

4 Q. Have you seen any evidence in this case  
5 as to whether Mr. Williams was made aware of the  
6 warnings on the packages of cigarettes?

7 A. Yes. In the depositions there are  
8 indications of family members at least brought the  
9 warnings to his attention.

10 Q. Did any of his other family members, to  
11 your knowledge, warn him about the risks of  
12 smoking?

13 A. Do you mean beyond his -- the people  
14 living in his household?

15 Q. Yes.

16 A. Yes, I believe Mr. Henry Williams drew  
17 that to his attention, as well. They had, in  
18 fact, even arguments about this smoking issue.

19 Q. To sum up, and to take the state of  
20 knowledge from 1964 to the present, did there come  
21 to be reported in the press the view that there  
22 was a lot of information available to the public  
23 about the risks of smoking?

24 A. That's correct.

25 Q. Is this one example of such a statement?

1       A.    Yes.  Actually, this comes from an  
2   article, Journal of the American Medical  
3   Association.  But I think it is indicative of the  
4   extent to which people were aware of the danger.  
5   This is an AMA statement to the effect that  
6   "labeling of cigarettes will not alert even the  
7   young cigarette smoker to any risks of which he is  
8   not already aware."

9       Q.    Was the date of that April 6, 1964?

10      A.    That's right, yeah.

11      Q.    Were there similar statements by  
12   authorities in the field during that time period?

13      A.    Yes, absolutely.  This is Daniel Horn.  
14   Remember his picture before, smoking a pipe along  
15   with E. Tyler Hammond.  He was one of the major  
16   players in the research.  He said in 1968, "You  
17   can stand on a rooftop and shout smoking is  
18   dangerous at the top of your lungs and you would  
19   not be telling anyone anything they didn't already  
20   know."

21                So the state of knowledge was  
22   considerable.

23      Q.    Now, Professor May, we have shown the  
24   jurors a lot of newspaper headlines, and we won't  
25   belabor the point.

1 A. Yes.

2 Q. But from 1964 to the present time, did  
3 there continue to be in The Oregonian frequent  
4 reporting about the health risks of smoking and/or  
5 its addictive qualities?

6 A. Yes, that's right.

7 Q. You mentioned earlier The Scanner  
8 newspaper.

9 A. That's correct.

10 Q. Do you have any reason to believe that  
11 Mr. Williams read The Scanner newspaper?

12 A. Yes. We know that from depositions as  
13 well. We were that told he was a reader of The  
14 Scanner.

15 Q. Again, without going into specifics that  
16 might be redundant, did The Scanner report on  
17 stories about the health risks of smoking and/or  
18 its addictive qualities?

19 A. Absolutely.

20 Q. Do you have similar evidence from the  
21 depositions regarding whether Mr. Williams read  
22 Ebony and Jet Magazines?

23 A. Yes, I do. He was a reader of those  
24 magazines.

25 Q. Did you review those magazines to see if

1 those also covered stories about the health risks  
2 of smoking and/or its addictive qualities?

3 A. Yes, I did.

4 Q. And did they?

5 A. They did.

6 Q. Did Mr. -- did you review any material to  
7 the effect that Mr. Williams may have developed a  
8 persistent cough at some point in time?

9 A. Yes, that's right. It is in the  
10 depositions, as well.

11 Q. And do you recall whether that was in the  
12 decade of the '70s?

13 A. I believe it is in the '70s. I think  
14 Mr. Henry Williams -- I'm trying to recall. I  
15 have seen so many depositions. I believe  
16 Mr. Henry Williams talks about that. He was still  
17 living in Portland, I believe.

18 Q. And were there any statements in the  
19 depositions as to whether friends and family  
20 members expressed concern to Mr. Williams about  
21 whether his cough might be related to his smoking?

22 A. Oh, yes. There is plenty evidence that  
23 they were showing their concern that way.

24 Q. I would like to bring us well forward in  
25 time to the 1988 Surgeon General's Report. Are

1 you familiar with that report?

2 A. Oh, yes, I am.

3 Q. What was the primary finding of that  
4 report?

5 A. Well, its primary finding was that in  
6 view of the Surgeon General, cigarette smoking was  
7 addictive. The federal government went on record  
8 in that regard to point out that, as I have  
9 already told you, from early in the century and  
10 even before there was constant reference to the  
11 fact that smoking was addictive. Through the  
12 '80s, the Surgeon General is leaning in a  
13 direction making clear indications. C. Everett  
14 Koop -- the man with the beard -- C. Everett Koop,  
15 the Surgeon General, he was leading in that  
16 direction.

17 And finally, in that report, the Surgeon  
18 General's report, there, is making a big story,  
19 front-page story, it was official, too, that the  
20 federal government viewed cigarette smoking to be  
21 addictive.

22 Q. And perhaps this is implicit in what you  
23 just said. But was that a story that was widely  
24 covered, including in The Oregonian?

25 A. Absolutely, oh, yes.

1 Q. Now, after 1988, did Mr. Williams' family  
2 offer him any warnings or guidance about quitting  
3 smoking?

4 A. Oh, yes. Constantly.

5 Q. Did he at some point receive a book on  
6 the subject?

7 A. He did. At least one I know about.

8 Q. Is that a copy of the book?

9 A. Yeah. This is one -- I told you  
10 before -- shown you before, articles and so on  
11 that are designed to help people break the habit.  
12 And this is one which is quite popular in this  
13 period, and what's particularly significant about  
14 this one is, it is given to him by his son, Jesse  
15 Jr., I believe.

16 Yes, Jesse, Jr. And it has an  
17 inscription on it. I don't know the words by  
18 heart. But to paraphrase, it by saying that, you  
19 know, here's something to help you lick this  
20 terrible habit, Dad. I know you can do it.  
21 Something like that.

22 MR. RANGLES: Professor May, thank you.

23 You may return to the stand.

24 Your witness.

25

## CROSS-EXAMINATION

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BY MR. GAYLORD:

Q. Professor May, interpreting other people's statements under oath and depositions isn't part of your prior experience as a historian, is it?

A. Not necessarily depositions, no.

Q. Even when you use words like "constantly" to describe somebody's else's statement about how many times or whatever they did to tell something to Jesse Williams, that's your word characterizing something that you read that somebody else is really the witness to?

A. Well, that's true to some extent. But also it reflects my reading of such warnings or such urgings in the depositions themselves.

Q. I understand, but we should take the deposition -- you are dealing in the difference between secondary and primary sources, don't you?

A. That's correct, sir.

Q. And the deposition is a primary source?

A. That's correct.

Q. I want to get a little better understanding of what you have done in your life,

1 prior to this case, at least, and I'm afraid I may  
2 call you "Doctor" rather than "Professor." I  
3 appreciate what your preference is, but forgive me  
4 if I do that. It is a habit formed over, at least  
5 the last several weeks here. You'd rather go by  
6 Professor?

7 A. If you call me Doctor, I won't object.

8 Q. You have an area of particular expertise  
9 and interest within the broader field of history  
10 in your academic career, don't you, sir?

11 A. Yes.

12 Q. And you devoted your doctoral thesis and  
13 your publications since that time primarily to  
14 part of the world and its history. That is what  
15 you are really known for, isn't it?

16 A. I would say not one part of the world  
17 alone. I view myself as a specialist on U.S.  
18 relations with Southeast Asia; in particular, the  
19 Philippines. I mentioned a number of books. Most  
20 of them deal with that. I also do deal with the  
21 Philippines itself. So both U.S. and the  
22 Philippines.

23 Q. Do you happen to know is there a web page  
24 on the internet with your name on it?

25 A. I think there is. I haven't seen it

1 myself, but I believe there is something the  
2 university puts up there.

3 Q. Is that something put on by the history  
4 department?

5 A. You know -- it is put on by an  
6 undergraduate technological specialist who  
7 compiled that for faculty by the name of Veronica  
8 Lee.

9 Q. If it has an e-mail address that ends in  
10 "history/people/faculty/regular/may.htm," that  
11 implies it is at least part of a web site for  
12 people in the history department?

13 A. I would suspect so. I must confess to  
14 you, I have never seen it myself, so --

15 Q. If I show you a copy of it, just so we  
16 are, so to speak, on the same page, can you tell  
17 me, is that it?

18 A. Yes, it seems to be. Glenn May, that's  
19 me.

20 Q. And as I glance down, I don't see the  
21 word "tobacco" on here. Is that correct? It is  
22 not on here?

23 A. I didn't look at it fully, but I'm sure  
24 it is not on here.

25 Q. Or "smoking"?

1 A. Or "smoking," either.

2 Q. Or "health"?

3 A. I'm not sure if "health" is on there or  
4 not.

5 Well, yeah. It is not. As I say,  
6 Ms. Lee didn't consult us. At least me. That's  
7 an area of my specialization, actually, the  
8 history of health.

9 Q. It says your name and it has four points  
10 about your address. Then it says, "Biographical  
11 information."

12 A. Uh-huh.

13 Q. Am I reading this correctly? "Professor  
14 specializing in Southeast Asia, United  
15 States-Philippine relations"?

16 A. Uh-huh.

17 Q. That's correct?

18 A. Yes.

19 Q. That's the subject that you wrote your  
20 doctoral thesis in?

21 A. Actually, I wrote my doctoral thesis on  
22 U.S.-Philippine relations.

23 Q. Okay. And it has major publications and  
24 there are one, two, three, four of them. Who's  
25 Andres Bonifacio?

1           A.    He is a Philippine national hero.  
2           Q.    That's the first time that word appears  
3   in the first publication?  
4           A.    Right.  
5           Q.    Battle for Batan --  
6           A.    Battle for Batangas.  
7           Q.    "A Philippine province a war"?  
8           A.    Right.  
9           Q.    And then, "A past recovered" --  
10          A.    That, by the way, is the study of the  
11   Philippine-American war and the province and the  
12   Filipinos who fought in the Philippines.  
13          Q.    Next one is "Essays on Philippine  
14   history."  
15          A.    Uh-huh.  
16          Q.    Next one and last one is "Social  
17   engineering in the Philippines."  
18          A.    "The aims, execution, and impact of  
19   American colonial policy," right.  
20          Q.    Current Research and Writing, and this is  
21   updated as of January 13, 1999?  
22          A.    Well, you are telling me that.  
23          Q.    I'm asking you. Is that what this page  
24   indicates, that it is updated January 13, 1999?  
25          A.    Could you read --

1 Q. V.V. Lee.  
2 A. That's Veronica Lee that did the updating  
3 without consulting me.  
4 Q. That's two months ago tomorrow. It says,  
5 "Current research and writing. General history of  
6 the Philippines."  
7 A. Yeah, that's not true.  
8 Q. That's not true?  
9 A. No, it's not true.  
10 Q. The University of Oregon has put an  
11 incorrect statement about who you are and what you  
12 do?  
13 A. That part is untrue, I am sorry to say.  
14 Q. The last thing on it says, "Recent  
15 Teaching."  
16 A. Uh-huh.  
17 Q. "Philippine Teaching. History of  
18 Southeast Asia. Vietnam and the United States."  
19 A. Yeah.  
20 Q. Are you opening a new branch of the  
21 history department at University of Oregon on  
22 smoking and health?  
23 A. No, sir.  
24 Q. Is the study that you have done for  
25 Philip Morris in this case -- would that be fair

1 to call it side-lighting or moonlighting from your  
2 professorship?

3 A. Well, that would be your  
4 characterization, sir.

5 I should point out, by the way, just to  
6 clarify something, that my current research  
7 project, and has been so for more than a year, is  
8 I have been doing a study on the history of cancer  
9 in the United States. Ms. Lee did not put that  
10 down.

11 Q. Excuse me. I'm going to need you to  
12 answer the questions that I ask you. And if you  
13 need to say more, I'm not trying to constrict you.  
14 But to get done today, I'd like to stay on track.

15 MR. RANGLES: Objection to Counsel  
16 interrupting the witness in response to the  
17 answer. And also object to his instruction.

18 THE COURT: Overruled. Go ahead,  
19 Mr. Gaylord.

20 BY MR. GAYLORD:

21 Q. I didn't mean disparagement when I said  
22 "moonlighting." I am trying to use a familiar  
23 term.

24 The work you have done for Philip Morris  
25 is aside from your academic responsibilities?

1           A.    The work I have done for Shook, Hardy &  
2   Bacon, which is the law firm that represents them,  
3   is done in my free time.

4           Q.    Okay.  And that was 60 to 80 hours a  
5   month for the last year?

6           A.    Uh-huh.

7           Q.    And we wouldn't expect you to do that for  
8   free, but I assume you are billing them for that  
9   time?

10          A.    That's right.  Shook, Hardy, Bacon is who  
11   I'm billing.

12          Q.    What's your hourly rate?

13          A.    It averages to about 120 an hour.

14          Q.    Would it be fair to average it out at 70  
15   hours, if it was 60 to 80, could we say 70 hours a  
16   month and get a pretty close approximation?

17          A.    Something like that.

18          Q.    Okay.  Have you ever had another instance  
19   in your career where you have worked on a separate  
20   research project that brought you in income in  
21   excess of \$80,000 in a year?

22          A.    No, sir.

23          Q.    Now, I notice, looking through some of  
24   the boxes that are here, and forgive us, we  
25   scrambled, we didn't get by any means through all

1 of them, or a good sense of all of them. So if I  
2 get stuff out of context, you let me know.

3 In the little bit of stuff we were able  
4 to get a look at, I notice you have done some  
5 legal research for Shook, Hardy, Bacon during part  
6 of that same period of time.

7 A. I don't know what you are referring to,  
8 sir.

9 Q. Well, I saw some notes and I put them  
10 back. So I'm not going to try to find them right  
11 now unless I need to.

12 You were saying you had looked up some  
13 Oregon statutes and sent them copies about things  
14 about that and advised them of your interpretation  
15 of some of the law in Oregon that applied to cases  
16 like this.

17 A. It sounds familiar.

18 Q. You don't have a legal background, do  
19 you?

20 A. No, sir.

21 Q. In your review and your awareness of  
22 historical things that apply in a case like this,  
23 have you become aware that one of the concerns of  
24 Oregon law is that manufacturers be held  
25 responsible for a level of knowledge about their

1 products, the level of an expert with respect to  
2 the hazards and risks associated with their  
3 product?

4 A. Could you repeat that, sir?

5 Q. Do you know, is it part of what you  
6 discovered about Oregon law of product liability  
7 that a manufacturer is responsible to have the  
8 knowledge of an expert about its product?

9 MR. RANGLES: Objection, Your Honor.

10 Beyond the scope of the direct and beyond the  
11 scope of this witness' expertise. It calls for  
12 a legal conclusion.

13 THE COURT: Sustained.

14 BY MR. GAYLORD:

15 Q. Do you have any expertise at all about  
16 the responsibility of manufacturers under Oregon  
17 law?

18 A. I don't, sir.

19 Q. Okay. And I take it from the testimony  
20 that you have given so far, you did not at any  
21 time in your work for Shook, Hardy, Bacon or  
22 Philip Morris undertake to answer any questions  
23 about the knowledge or expertise of Philip Morris  
24 or the Tobacco Institute with respect to hazards  
25 of cigarette smoking?

1           A.    I think that's correct. I was focusing  
2   on common knowledge, if I understand your  
3   question.

4           Q.    Okay. In fact, I think I want to put one  
5   on the sets of phraseology back in front of the  
6   jury. You are welcome to come and look at it. I  
7   will tell you which page I turned. It is the one  
8   where you divided the page.

9           Feel free to take a look. It is the one  
10   with the headings "Common Knowledge" and  
11   "Scientific Knowledge."

12          A.    Oh, yes.

13          Q.    I want to get a little sense from you of  
14   how those words are used, because I got the sense,  
15   as you were talking to us today, that you are  
16   using those two phrases as sort of terms of art.  
17   Are those terms of art in history?

18          A.    Could you explain to me? I'm not trying  
19   to be evasive, I want to understand what you mean  
20   by "terms of art." I haven't heard that -- I've  
21   heard it in other fields -- but not in history.

22          Q.    That's fair. "Term of art" probably  
23   needs to be defined, too. But, is the two-word  
24   phrase "common knowledge" something that you have  
25   studied and researched and been familiar with as a

1 historian or history professor before you took on  
2 this?

3 A. Absolutely. In the "Battle of Batangas,"  
4 it was about that principle.

5 Q. Is the term "scientific knowledge" to  
6 distinguish it from "common knowledge," also a  
7 term that has a defined meaning for you as a  
8 historian and professor?

9 A. Well, it has defined meaning. As I  
10 explained before, this is well out of my can. I'm  
11 not a scientist. It is the stuff that I don't  
12 understand.

13 Q. Okay. Well, would you agree that medical  
14 science is scientific knowledge, not common  
15 knowledge?

16 A. Medical science is --

17 Q. Scientific knowledge?

18 A. Yes.

19 Q. And fits on the right side, not the left  
20 side of your chart?

21 A. Sometimes it does. As I say, sometimes  
22 what you call medical science -- that may be one  
23 of those oxymorons -- I'm not sure. But, in any  
24 event, that does move over onto the other side of  
25 the chart as time passes. I was making the point,

1 I guess, before, about cigarette lung cancer, that  
2 certainly by -- well, the point when we don't have  
3 as many stories about it is because it is in the  
4 realm of common knowledge.

5 Q. Okay. Maybe that's a shortcut. I think  
6 we are probably going to go the longer way to get  
7 to that.

8 I think you told us just in the last part  
9 of your direct examination that that point where  
10 there stopped being articles about that was in  
11 recent times.

12 A. Well, sir, I hope I didn't misspeak  
13 myself. I didn't mean to say there stopped being  
14 articles.

15 Q. All right.

16 A. What I meant is there stopped being as  
17 many articles about it, because to most people's  
18 satisfaction, it was proved.

19 Q. Okay.

20 A. Scientists and public alike.

21 Q. Okay. Let's pause just for a moment on  
22 that subject, and we will come back to where I was  
23 going to go.

24 I heard you say earlier that around  
25 1900 --

1 A. Uh-huh.

2 Q. -- there was a great deal of stuff,  
3 information, folklore, it sounds like, about  
4 smoking and something to do with health.

5 A. Uh-huh.

6 Q. Is that a fair timeframe for when you  
7 felt that was true?

8 A. Well, even before that. I wouldn't -- I  
9 don't want to quibble here. I don't want to use  
10 the word "folklore," because, in fact, medical  
11 doctors are some of the people who are  
12 participating in these movements pointing out that  
13 it was dangerous for you. Some of the major  
14 tracks and books are by a couple of doctors.

15 Q. Let's focus then -- I guess we might as  
16 well do this chronologically.

17 That early period of time --

18 A. Uh-huh.

19 Q. -- you took us back to King James and the  
20 Counterblaste and 1604.

21 A. Right.

22 Q. That, by the way, is written in middle  
23 English, isn't it?

24 A. Well, it is recognizable English, not  
25 middle English. (Witness spoke inaudibly.)

1 That's middle English.

2 The thing about King James English, it is  
3 the first modern English. It is the King James  
4 Bible, the bible we read.

5 Q. Feel free to express your answers in any  
6 English you like.

7 Let's get to this period of around 1900.  
8 I think you made a stop there and said something  
9 about the state of common knowledge at about 1900.  
10 And just to get us a starting point, to start, I  
11 think you indicated to us, but as of that time it  
12 was common in the things that you have reviewed  
13 that there were comments about smoking and ill  
14 health.

15 A. Yes.

16 Q. Is that fair?

17 A. Yes.

18 Q. Is it your impression that as of that  
19 time, now, still focusing on about the turn of the  
20 century, anybody had any idea that smoking had any  
21 relationship whatsoever to lung cancer?

22 A. Well, the answer to your question, there  
23 actually was a Dr. Joel Shue (phonetic) who  
24 mentioned it in one of his books. But this is an  
25 obvious -- an important point. Cigarette

1 smoking -- sorry, I have to do this. I'm the  
2 professor, right?

3 Cigarette smoking really becomes popular  
4 in the U.S. in the 1880s. You are asking about  
5 1900. 1900.

6 Q. Doctor --

7 A. It takes 20 years, we know that  
8 from -- at least 20 years for smokers to get lung  
9 cancer. So the answer to your question I think is  
10 pretty obvious. In fact, there were in the teens,  
11 '20s and the end of the '30s, increasing  
12 indications that lung cancer became a problem.  
13 But 1900, other things they are talking about.  
14 Tobacco, heart, the stuff I am talking about from  
15 the textbook. Tobacco, heart, heart disease of  
16 various sorts, bronchial problems, a whole range  
17 of abnormality -- Dr. Joel Shue mentions 87,  
18 including lung cancer.

19 Q. Dr. May, let me ask you this: I may have  
20 misunderstood. I did not understand that you had  
21 research the scientific literature on smoking and  
22 health.

23 A. Oh, no. What I said, I'm not -- sorry, I  
24 hope I didn't interrupt you. I'm not a specialist  
25 on science. I don't understand contemporary

1 science. If you ask me about genes, P53 genes,  
2 and what geneticists, now telling what the causes  
3 of cancer, I have great deal of difficulty  
4 understanding that stuff.

5 Q. You wouldn't claim expertise in medical  
6 science?

7 A. No.

8 Q. Epidemiology?

9 A. Absolutely not.

10 Q. Psychology?

11 A. Absolutely not.

12 Q. Sociology?

13 A. I don't know much about sociology.

14 Q. Advertising and marketing?

15 A. That's right. I don't.

16 Q. Consumer expectations?

17 A. Consumer expectations, no.

18 Q. And to the extent that you have any  
19 knowledge of any report about lung cancer, you are  
20 not claiming that that made its way into public  
21 awareness or common knowledge prior to the 1930s,  
22 would you?

23 A. It is in the 1930s. I will tell you  
24 which articles when you consult about that.

25 Dr. Arnold Ochsner started producing articles on

1 that subject. There are others, actually. The  
2 Germans did some research on that subject, I  
3 understand.

4 As I said, I'm not a scientist. I don't  
5 profess to be able to understand those studies as  
6 a scientist would.

7 Q. Do you know whether lung cancer was even  
8 reported and recognized in medical science as a  
9 common disease prior to 1930s?

10 A. It was -- I'm going to try to tell you  
11 that the data in which the diagnosis occurred. It  
12 is from secondary literature, it is about 1913,  
13 something along those lines. Maybe you know the  
14 answer to it.

15 Q. You are referring to the first reported  
16 cases?

17 A. No, no, I'm talking about the points in  
18 which it is mentioned as a cause. Let me point  
19 out, this is not my area of specialization,  
20 medical science and --

21 Q. All I'm trying to do, Doctor, is to make  
22 sure I know what you just said. I think you just  
23 said that it was around 1913 that there was the  
24 first report in medical literature -- let me  
25 finish -- linking a case of lung cancer to

1 smoking?

2 A. No, no. Sorry if I said that. I  
3 misspoke. As I told you before, Dr. Joel Shue  
4 does mention cancer of the lung as one of the  
5 possibilities.

6 Q. I want to talk about the two topics on  
7 this page of the flip chart, "common knowledge"  
8 and "scientific knowledge."

9 You said this morning that inevitably  
10 over time, if it is good scientific knowledge, it  
11 will pass into common knowledge. Do you recall  
12 saying that?

13 A. Sounds familiar.

14 Q. And so the concept is that information  
15 that starts out on the right-hand column works its  
16 way over to the left-hand column over time if it  
17 is good scientific information?

18 A. Yes, that certainly can happen.

19 Q. And then isn't really this case and the  
20 crux of your testimony about how fast that happens  
21 and whether or not that transference to common  
22 knowledge is hampered in some way? Do you agree  
23 with that?

24 A. No, I don't. I don't. If I can just  
25 elaborate a little bit.

1           My point is that common knowledge about  
2 the hazards of smoking, not common knowledge that  
3 it could kill you, preexisted a lot of these  
4 medical discoveries I talked about. The common  
5 knowledge was already there. That's my testimony.  
6 I don't know what your case is. I haven't  
7 followed this case that closely.

8           Q. Let's be sure we understand what your  
9 testimony is then.

10           Are you saying that popular knowledge  
11 about the relationship between smoking and lung  
12 cancer preceded medical science on that point?

13           A. No. I'm saying that in -- as of 1900 --  
14 you were asking, I was responding to a question,  
15 was there some -- any evidence about cancer of the  
16 lung. My answer was yeah, not a whole lot.  
17 Because of this. It becomes a major problem after  
18 people have been smoking for quite a while.

19           Q. Okay. I think one of the things we  
20 probably need to do is to be careful about our  
21 terminology here, because it seems to be a kind of  
22 range of ways to talk about smoking and health all  
23 the way from smoking causes something bad to  
24 happen to smoking causes addiction and lung cancer  
25 and death.

1 A. Uh-huh.

2 Q. Okay. Let me ask you about that latter  
3 point.

4 Do you believe, from your review of the  
5 literature and your workup of all these documents  
6 and all the hours you have put into this over the  
7 last year, that smoking causes lung cancer?

8 A. You are asking my personal opinion on  
9 that, I take it?

10 Q. You have expressed a number of opinions.  
11 I assume as a historian, when you have an opinion,  
12 it is yours, isn't it?

13 A. Well, that's true, but I'm not a  
14 scientist. That's my point. I'm making this  
15 distinction.

16 MR. RANDLES: Objection, Your Honor.  
17 Counsel is asking for a medical opinion or  
18 scientific opinion.

19 THE COURT: He is not asking for a  
20 medical or scientific opinion. He is asking for  
21 this person's opinion having studied the  
22 literature. If he developed one, he is entitled  
23 to inquire to it. But it is not a scientific or  
24 medical opinion. It is this human being's  
25 opinion over here.

1 THE WITNESS: Thank you, Your Honor.

2 Well, with that proviso, I'm not a  
3 scientist, yes, I believe that smoking causes  
4 lung cancer.

5 BY MR. GAYLORD:

6 Q. And you came to that opinion by reviewing  
7 the material that you have reviewed?

8 A. No. I came to that opinion by living  
9 with an addicted smoker who died of  
10 smoking-related illness. My dad. And when you  
11 live in a family with an invalid, you -- it has an  
12 impact on you.

13 Q. I'm sorry, but did you draw your own  
14 conclusions from that experience that that changed  
15 you personally in your view of your relationship  
16 between smoking and lung cancer?

17 A. I was a little child when my dad first  
18 had heart attacks, was told to get off smoking,  
19 the smoking, the coughs in the mornings. I woke  
20 up in the morning to my dad's smoking cough. It  
21 wasn't much of a -- it wasn't very difficult for  
22 medical science reports to be convincing to me. I  
23 knew smoking was bad.

24 Q. And you may have already answered this  
25 within your other opinion, but do you believe that

1 smoking cigarettes is addictive?

2 A. I do. My dad, in my view, was addicted.

3 Q. Do you find it a little ironic that  
4 Philip Morris, whose lawyers hired you to come  
5 here and express your opinions about common  
6 knowledge, denies to this day that cigarette  
7 smoking causes lung cancer or addiction?

8 A. Ironic? Well -- I guess I don't. The  
9 answer to that, I'm not a big boy, and I do make a  
10 distinction between common knowledge and  
11 scientific knowledge. I'm not going to be -- I  
12 don't view myself as a defender of Philip Morris.  
13 I am someone who tells you about the history.

14 In terms of the scientific side of  
15 things, I think it could be that what  
16 Philip Morris is denying, that in their view it is  
17 scientifically proven, that's -- that's my reading  
18 of the situation. So I don't see great ironies,  
19 but others might.

20 Q. You don't think there is any  
21 inconsistency in Philip Morris' position between  
22 claiming that common knowledge knows these facts,  
23 while their position publicly is that they are not  
24 proven?

25 A. I don't. I don't. I do see a difference

1 between these two.

2 Q. That's fine.

3 Let me ask you, in your studies as a  
4 historian, and your work in this case reviewing  
5 documents, can you comment on this question: Is  
6 it fair to add those two columns together, common  
7 knowledge and scientific knowledge, and call it  
8 Philip Morris' knowledge?

9 A. You want an answer to that question as to  
10 whether it is fair?

11 Q. Does that make sense?

12 A. To be honest, I don't understand the  
13 question.

14 Q. You have talked us through several  
15 different time periods, and I want to focus now  
16 for just a moment on my favorite, the period of  
17 the late '40s. And I first want to ask you, do  
18 you agree that Phil Harris really got the right do  
19 on the song?

20 A. How do you mean "the right do"? Like the  
21 Phil Harris version better than the Tex Williams  
22 version?

23 Q. Sure.

24 A. Actually, I like the Tex version better.

25 Q. I heard that when that was played and

1 listened to the words, this sentence, "I don't  
2 reckon they hinder your health."

3 A. Uh-huh.

4 Q. Do you remember that in the song?

5 A. Yeah, I think that's right.

6 Q. That's in there, isn't it?

7 A. Yes.

8 Q. Do you think that part of the language in  
9 the song became part of the common knowledge?

10 A. Well, I think it is -- my reading of  
11 that. This is also outside of my area of  
12 expertise, reading text in songs, but I will do my  
13 best.

14 I think it is implying that it is -- a  
15 cigarette smoker is, in fact, denying it, denying  
16 that it is hindering his health. But at the same  
17 time, it is killing him. That's what the refrain  
18 is telling you.

19 Q. Now, your science and your expertise  
20 stops short, I guess, of evaluating that  
21 phenomenon among the body politic, the body of  
22 people that make up common knowledge. You haven't  
23 looked at the question, do cigarette smokers, in  
24 any one of these periods of time in history,  
25 generally deny the health risks?

1       A.    Ah, I haven't, certainly not in any  
2 detail, but can I just add a little phrase I have  
3 seen some -- no, actually, I haven't looked at  
4 that stuff at all. I was going to add something,  
5 but I actually have nothing to add.

6       Q.    I guess part of what you might be telling  
7 us, it wasn't part of your commission for Shook,  
8 Hardy, Bacon to look at questions like denial by  
9 cigarette smokers?

10      A.    Well, I take exception with the  
11 commission. I spent time on my own research  
12 strategy. I could have looked there if I wanted  
13 to. I just chose not to do it.

14      Q.    Well, didn't Philip Morris' lawyers give  
15 you some guidance when they hired you for this  
16 job? Didn't they indicate to you that they wanted  
17 an assessment of how much information was there  
18 available that could be on the side of people  
19 knowing health risks of cigarettes?

20      A.    No, they didn't give me that. It was a  
21 very open-ended assignment, if you like, and I  
22 defined it myself. We went this way. I said,  
23 listen, in my view, my dad died as a consequence  
24 of what I allege as cigarette -- cigarette-caused  
25 illness. So, you know, I have strong feelings

1 about these issues. There are some things I am  
2 interested in investigating myself.

3 They said, fine. I said, I don't know if  
4 I'm going to come out with -- how this information  
5 is going to come out. I'm a historian. I look at  
6 the evidence. I weigh the evidence. I come to my  
7 own conclusion. They said, fine.

8 Q. Okay. Well, you told the jury at some  
9 length this morning that the health hazards of  
10 smoking were known at various times in history,  
11 including they were known in Crockett, Texas, in  
12 part of the school curricula in the 1940s; is that  
13 a fair summation?

14 A. Yes.

15 Q. But maybe it was the lack of guidance or  
16 maybe it was that you were asked to -- allowed to  
17 choose your own criteria for the health hazards  
18 you are talking about. You don't claim to this  
19 jury that anybody in Crockett, Texas knew that  
20 cigarette smoking caused lung cancer, do you?

21 A. I don't -- in that time period you are  
22 talking about, in 19 -- I don't claim that, no.  
23 No.

24 Q. In fact, what you based your discussion  
25 from there is from some textbooks that you claim

1 were available in the schools there?

2 A. Yes, that's right.

3 Q. Do you know whether the schools there  
4 were integrated or segregated?

5 A. In Texas, in --

6 Q. Crockett, Texas, in the '40s.

7 A. I don't -- I suspect they were  
8 segregated.

9 Q. Do you have any idea that the curricula  
10 that you looked at was available in the black  
11 schools?

12 A. Yes, it was. These are mandated across  
13 the board.

14 Q. So if we look at Defendant's Exhibit 743,  
15 which is the 1935 -- one of the two textbooks that  
16 you referred to --

17 A. Yeah, Brown, Ireland --

18 Q. Which is called Health and Safety Helpful  
19 Living?

20 A. It's for the elementary school. I just  
21 want to point that out for the jury's benefit.

22 Q. Under the topic of "Avoiding Tobacco,"  
23 what we see listed is the harmful effects of  
24 tobacco. I need to get this centered.

25 "The fact that a person craves tobacco

1 does not mean that does him any good. On the  
2 other hand, it may do him harm in a number of  
3 ways. First, it may keep him from growing as much  
4 as he would if he left it entirely alone."

5 A. Yes.

6 Q. Did you grow up being told it would stunt  
7 your growth?

8 A. Absolutely. Didn't you?

9 Q. Yeah.

10 A. Yeah.

11 Q. Second, it may affect the delicate  
12 linings of his nose and throat and make them less  
13 able to protect his body from certain diseased  
14 germs."

15 A. Yeah.

16 Q. "Third, it may slow down the action of  
17 his brain so that he does not learn or think as  
18 well as he could if he left it alone."

19 A. Uh-huh.

20 Q. "Fourth, it may cause him to become  
21 nervous. In fact, it may even keep him from  
22 sleeping properly at night. This is especially  
23 true if he uses it in very large quantities.

24 "Fifth, it may affect the way he works,  
25 making it very difficult for him to work as much

1 or as well."

2 A. Uh-huh.

3 Q. And, as you pointed out earlier, if you  
4 were to ask your doctor or almost any older person  
5 about using tobacco, he would advise you to leave  
6 it alone.

7 A. Yes.

8 Q. Do you have any information about whether  
9 Jesse Williams and his family had a personal  
10 physician in the '40s in Crockett, Texas?

11 A. I don't, sir.

12 Q. The other textbook from that time period,  
13 Defendant's Exhibit 745, Health and Human Welfare.  
14 This is the one that I think you indicated was  
15 high school or junior high?

16 A. If I could see the title, I could tell  
17 you.

18 It is high school. It is "HS."

19 Q. And it was full of good information about  
20 tobacco products, including nicotine, "The  
21 alkaloid of tobacco considered a violent poison  
22 does not appear in tobacco smoke"?

23 A. Uh-huh.

24 Q. And this is real hard to read.

25 "Observations by some of the world's best

1 authorities." I don't think it can be focused any  
2 better. It is the way the original is.

3 "By some of the world's best authorities  
4 seem to indicate that a man may bring on one or  
5 the following disturbances to his body by heavy  
6 smoking: High blood pressure, rapid heart action,  
7 shortness of breath, palpitation of the heart, and  
8 pain in the region of the heart."

9 A. Uh-huh.

10 Q. And, like the other one, "Tobacco is  
11 injurious to the development of a boy, and  
12 therefore, does him permanent physical harm."

13 Then it goes on to say, "Smoking, even in  
14 moderation, is a handicap in athletics.  
15 Nonsmoking athletes show more consistent  
16 improvements than athletes who smoke and  
17 nonsmoking athletes are better disciplined and in  
18 other ways more helpful to a team than smokers."

19 A. Yeah. Right.

20 Q. So you are not suggesting that in the  
21 '40s anything came into the common knowledge that  
22 should have told any smoker or prospective smoker  
23 that they could get lung cancer from smoking  
24 cigarettes?

25 A. I would say that's a fair

1 characterization. I would say 1940 -- one  
2 exception. 1949 studies of Ernest Wynder, I  
3 mentioned showed it before. It wasn't pictured,  
4 did get a good deal of publicity. And to some  
5 extent, the Stars and Stripes articles --  
6 actually, there are 48 in -- 48 pick up on the  
7 Oshsner studies. So there is some of that even in  
8 the late '40s in the public domain, whether it is  
9 in common knowledge in Crockett, Texas -- the  
10 record will show that I shrugged.

11 Q. The record will show I fumbled for the  
12 next piece of paper I wanted to use.

13 You are aware from your research, I  
14 assume, that smokers by the '50s and '60s reached  
15 all time highs in their percentage of the  
16 population?

17 A. Yes, in terms of percentages. Isn't  
18 that -- with that qualification, yes.

19 Q. 70 percent of American males were smokers  
20 in the mid-1950s; isn't that about right?

21 A. Yes, that's right. I was just meaning in  
22 terms of numbers. It actually might even be  
23 higher now. In terms of percentages for sure.

24 Q. Do you think that that fact affects your  
25 assessment of what was common knowledge in terms

1 of the degree of appreciation they had for the  
2 risks associated with smoking?

3 A. Interesting point. Now, I would make a  
4 distinction in my -- this is the distinction I  
5 would make. Sorry if I have to go to the butcher  
6 block paper.

7 What I'm studying in terms of common  
8 knowledge -- remember that chart. Smoker, in the  
9 middle, are the inputs. The inputs. Things that  
10 are going in. Family, school, text, newspapers,  
11 magazines, and so on.

12 Now, in terms of common knowledge, it  
13 seems to me as though a good deal of the  
14 information about lung cancer was, in fact,  
15 getting to people. It might sound like a paradox,  
16 because it has been pointed out that some people  
17 are smoking. But it doesn't necessarily mean that  
18 people are necessarily convinced yet. Maybe they  
19 are not convinced.

20 Scientific in the '50s wasn't convinced  
21 yet. They weren't speaking with a uniform voice,  
22 so as -- as opposed to what they know. This is  
23 what they know. What they think may be different,  
24 but you know what, if we look at action, that's  
25 what people do, behavior. And that's the question

1 about action. Huh?

2           It may be that people weren't convinced.  
3 They weren't -- they didn't think that it was  
4 dangerous. But, you know, there are other reasons  
5 why we do things. Isn't that true? Like we like  
6 them. Or we are risk-takers.

7           I lived with one. My dad was a  
8 risk-taker. He gambled. He loved prize fights.  
9 He liked living the life at the edge.  
10 Unfortunately, he had a son -- I wasn't around  
11 to -- he wasn't around to see me grow up. So the  
12 question is, what -- do people think this? Do  
13 they actually think that? I don't know. Maybe  
14 lots of them are risk-takers. Maybe lots of them  
15 weren't convinced. What I am telling you, though,  
16 is that the knowledge was increasingly there. The  
17 knowledge was there.

18         Q. Do you think maybe one of the reasons for  
19 that paradox, as you call it, was the influence  
20 that people were under from other sources on this  
21 subject?

22         A. For example?

23         Q. For example, you haven't been provided or  
24 looked at any of the internal documentation of  
25 Philip Morris?

1           A.    I have not. That's correct. That's  
2 correct.

3           Q.    So all of the information that you have  
4 been providing the jury stops at the border of  
5 where more information might come from inside  
6 Philip Morris or from the Tobacco Institute that  
7 has been its public relations arm for 50 years, 40  
8 years?

9           A.    Excuse me. The border, it stops at is  
10 the Oregon border. What I'm focusing on  
11 principally is Oregon. What people in Oregon --  
12 what a smoker, this individual in Oregon,  
13 understands. What the person knows. So to the  
14 extent it is in company's records, it isn't, in my  
15 view, relevant to what those people know. I want  
16 to clarify that point.

17          Q.    Well, you don't claim that the public  
18 relations efforts of Philip Morris and the  
19 industry PR branch stopped at the Oregon border,  
20 do you?

21          A.    No, I don't. I don't claim -- to the  
22 extent that they passed the Oregon border, that's  
23 when they come within my ken, my view, my purview  
24 of understanding what public knowledge is, what  
25 common knowledge is, what public awareness is.

1 Q. Is public knowledge and public awareness  
2 influenced by speeches?

3 A. It could be, if people are exposed to  
4 them. Here again, sorry to do the diagrams. Sort  
5 of -- you are asking. Okay. Here.

6 Q. Forgive me, Doctor, but I think it's a  
7 yes or no question.

8 A. Could be.

9 Q. Are speeches one of the things that  
10 influence common knowledge?

11 A. If they are heard, it could be.

12 Q. And your common knowledge that you have  
13 been describing to us is not just the knowledge of  
14 an individual who this case happens to be about,  
15 is it?

16 A. That's correct.

17 Q. It is the knowledge of sort of the great  
18 "them"?

19 A. Uh-huh.

20 Q. All of us?

21 A. Uh-huh.

22 Q. That's the knowledge that you are talking  
23 about?

24 A. Yeah.

25 Q. And that's knowledge that is influenced

1 by sources that we never hear about directly, but  
2 somebody else hears about it. It comes to us by  
3 word-of-mouth?

4 A. I suppose that's so. It could be. It  
5 could be. Yes.

6 Q. Isn't that true?

7 A. That could be an input, too.

8 Q. Every speech that is made to a group of  
9 people might have some effects, leave some ripples  
10 that spread out and affect common knowledge?

11 A. If it is reported -- if it is somehow --  
12 if it comes within that purview, it is possible.

13 Q. Okay. I'm going to show you and ask you  
14 if this would be part of what would influence  
15 common knowledge in your assessment, had you known  
16 about it. This is a document entitled -- I will  
17 read it, trust me.

18 We are looking at the address, James P.  
19 Richards, president, the Tobacco Institute before  
20 the National Automatic Merchandising Association  
21 in St. Louis, November 4, 1958. And he says,  
22 among other things: "Even though criticism  
23 travels faster and is more conspicuous than  
24 rebuttal, the American people did listen to  
25 reason. The steady climb in sales which had been

1 interrupted in 1954 continued in 1955 and today  
2 has reached a new record high."

3 Now, in context, that's discussing the  
4 recent difficulties of the tobacco industry with  
5 the slump in sales and the recovery. Do you know  
6 what he is referring to when he says the criticism  
7 is more conspicuous than rebuttal?

8 A. Let me just see that again. "Criticism  
9 travels faster and is more conspicuous than  
10 rebuttal." I guess what he is referring to is the  
11 fact that the tobacco industry is getting lots of  
12 unfavorable reports. Maybe I shouldn't say  
13 tobacco industry, but cigarettes are getting.

14 Q. Do you know what he means when he says,  
15 "but the American people did listen to reason"?

16 A. Well, I do -- if you're asking me how I  
17 read that document?

18 Q. Well, do you know what he is referring  
19 to?

20 A. I think then the next sentence is --  
21 would be the gloss on that one. It is explaining  
22 what he thinks is happening, which is that sales  
23 are climbing.

24 Q. With respect to listening to reason, do  
25 you know if he is referring to the message that

1 the Tobacco Institute has put out through its  
2 public relations campaign?

3 A. Boy, it is ambiguous to me. I wouldn't  
4 necessarily jump to that conclusion.

5 Q. You haven't seen any other parts of that  
6 message or the way it has been conveyed, have you?

7 A. Well, excuse me, sir. I did say that I  
8 looked at Oregon press, and quite extensively, and  
9 it is true that someone named Hartnett and others  
10 were quoted from time to time in the press. In  
11 fact, I think some of the documents I showed you  
12 were ones where there were such statements. So,  
13 yeah, occasionally. Not very often, but, yeah,  
14 those things were reported. Actually, I have  
15 figures on that, if you like.

16 Q. When you were talking this morning about  
17 Edward R. Murrow, you referred to the controversy  
18 about lung cancer.

19 A. Uh-huh.

20 Q. Do you believe there is a controversy  
21 about lung cancer today?

22 A. I hope not.

23 Q. All right. Do you believe everybody but  
24 the tobacco companies and the Tobacco Institute  
25 knows the truth about lung cancer today?

1           A.    It depends on what you mean by "knows the  
2 truth," I would say. Let me rephrase your words.

3           I would say common knowledge nowadays is  
4 that lung cancer is caused by cigarette smoking.  
5 That's what I would say common knowledge is today.  
6 It has been the case for a long period of time. I  
7 showed you Gallup Polls and so on.

8           Q.    In that relationship we had on the easel  
9 before us, common knowledge on one side and  
10 scientific knowledge on the other -- you don't  
11 need to bring them back. We will remember the  
12 terms. But, as you view the influence of media on  
13 common knowledge, is it possible for purchased  
14 media coverage to prevent scientific evidence from  
15 entering common knowledge?

16          A.    To prevent it, no. I don't believe so.

17          Q.    But to reduce its impact?

18          A.    That's a possibility.

19          Q.    To negate its impact on targeted  
20 audiences?

21          A.    Not to negate it, no. I would say it's a  
22 possibility. As I said, I have figures for Oregon  
23 about the number of statements attributed to  
24 tobacco industry research, Tobacco Institute. I  
25 would be happy to share them with you, if you

1 would like me to tell them.

2 Q. I'm not sure how helpful -- you have  
3 categorized the number of statements?

4 A. I have read the statements. I can give  
5 you content analysis of them: Year, month, as for  
6 it all. I would be happy to provide it.

7 Q. We may go into that in a minute.

8 Preliminarily, though, let me ask you,  
9 are you aware -- have you been provided with any  
10 of the information from Philip Morris in which one  
11 of their responses to the 1964 Surgeon General's  
12 Report was to state internally that sooner or  
13 later they were going to have to provide smokers  
14 with a psychological crutch in order to  
15 self-rationalize continuing to smoke? Are you  
16 familiar with that document?

17 A. No. Those company documents you are  
18 talking about?

19 Q. I'm talking about company documents.

20 A. As I said, I haven't reviewed company  
21 documents.

22 Q. Would knowing that kind of thing about  
23 knowing what Philip Morris was thinking and doing  
24 in an attempt to influence common knowledge be  
25 useful information to you in working up and

1 investigating for a year about what common  
2 knowledge has been about cigarettes and health?

3 A. Let me think about that. I don't think  
4 so. In fact, I know so. I don't believe it had  
5 much impact. There is this disconnect one has to  
6 recognize. Here you have, in your question,  
7 Philip Morris, and here you have, Oregon. And  
8 this stuff has to get there somehow or other. I  
9 am just telling you that what I have seen doesn't  
10 happen. So regardless of what's happening  
11 there -- listen, I have not reviewed those  
12 documents. I don't know what those documents say.  
13 All I can tell you is they got there very little.

14 Q. Okay. Here is one of the documents that  
15 you showed, I think, on the computerized thing  
16 this morning with Mr. Randles. This is The  
17 Oregonian from March 23, 1957.

18 A. Right, seven scientists study.

19 Q. You are familiar with this title, heading  
20 shown to the jury?

21 A. Yes. It is about -- right.

22 Q. You did not study and take into account  
23 or try to measure the effect of statements like  
24 this one contained in The Oregonian's coverage of  
25 the issue, did you, where it says, "The tobacco

1 industry declared the report apparently offers no  
2 original evidence."

3 This is referring to a report of seven  
4 scientists linking cigarette smoking and lung  
5 cancer. And the tobacco industry went on. It  
6 said, "The report relies heavily on statistics  
7 that have been widely questioned by other  
8 scientists as to their significance."

9 A. Uh-huh. And your question is?

10 Q. This is something that you agree got  
11 inside the borders of Oregon?

12 A. Yes, it did. Absolutely. That's why I  
13 included it.

14 Q. You agree this is a statement from the  
15 tobacco industry with a purpose?

16 A. You know, one thing -- one thing one  
17 learns at Yale University when you're going to  
18 graduate school at history, purposes are things  
19 you probably don't want to tread on too much, deal  
20 with too much.

21 I'm not going to comment on purpose. If  
22 it got into Oregon, i took it into account. In  
23 fact, this is one of the exhibits. But as I say,  
24 they don't occur frequently. And, again, I can  
25 provide you with figures.

1 Q. Have you had access to any of the  
2 scientists or specialists in the smoking and  
3 health fields who have expertise in the question  
4 of smokers' denial as part of the continuation of  
5 their smoking habit?

6 A. I haven't.

7 Q. I guess similarly, would it follow that  
8 you have not had access to any expertise yourself,  
9 or any others, about how things like warnings on  
10 packages influence smokers?

11 A. That's fair. I haven't.

12 Q. And you haven't studied questions like  
13 what are the habits of smokers with respect to  
14 those things, whether they read them, whether they  
15 heed them, whether they ignore them. That's all  
16 outside the boundaries of what you have tried to  
17 do?

18 A. The answer to your question, I haven't  
19 done that. I don't have knowledge with that,  
20 that's true.

21 Q. In your workup of common knowledge and  
22 what it contains at a given time in recent  
23 history, would it have made any difference to you  
24 had you been provided information like the  
25 following:

1           January 11, 1974, a press release from  
2 the Tobacco Institute, with statements like the  
3 following, "Take genetics alone," Kornegay  
4 continued. We know that's a spokesperson for the  
5 Tobacco Institute. "A recent study of 18,000  
6 twins showed that among identical twins there was  
7 no difference in the morality, even when one twin  
8 smoked and the other didn't, while there were  
9 higher morality rates among smokers in general.  
10 Could it be, Kornegay asked, that a high AHH level  
11 rather than cigarettes is, in fact, responsible,  
12 thus explaining why the vast majority of smokers  
13 do not develop lung cancer."

14           And continuing, "Clearly, smoking could  
15 not have been a factor in these cases. Perhaps  
16 genetics was, in some way, Kornegay observed.

17           "Carcinogenicity of tobacco tars has not  
18 been demonstrated in man, and there is no  
19 acceptable evidence that prolonged exposure to  
20 nicotine creates either dangerous functional  
21 change of an objective nature or degenerative  
22 disease."

23           This is a press release, again, January  
24 1974. Would that information have led you in any  
25 different direction in the question looking for

1 what common knowledge was in the '70s?

2 A. Again, sir, it wouldn't, because unless  
3 that information were to be communicated to people  
4 in Oregon, it wouldn't be relevant to the  
5 exercise.

6 Beyond that, let me point out, I think  
7 I'm a broken record, but maybe I'm just not making  
8 myself clear. I'm talking too fast. But the  
9 knowledge about the health dangers of smoking were  
10 widespread. So what you are mentioning -- I'm not  
11 a scientist, I can't assess that. But if you look  
12 through those stories, so much information is  
13 already in the press about it. How much is this  
14 going to -- thing going to add? I don't think it  
15 makes any difference in the case. It doesn't seem  
16 to have gotten there, at least in my memory.

17 Q. You consider yourself an intelligent  
18 person, Doctor? Above average?

19 A. I hope so.

20 Q. Certainly. We will all stipulate to  
21 that. You were a nonsmoker in the '70s, '80s,  
22 '90s?

23 A. I smoked maybe one or two cigarettes my  
24 entire life.

25 Q. Did you have any particular reason in the

1 '70s and '80s and '90s, prior to being hired by  
2 Shook, Hardy & Bacon, to pay close attention to  
3 the coverage in the press about smoking?

4 A. Not any more than I have already hinted  
5 of, which is that my dad was, in my view,  
6 addicted -- that's my word -- to smoking.

7 Q. Common knowledge, you have used the term.  
8 Let's see if we understand what you really mean by  
9 that.

10 Do you think there is any one person that  
11 has the residence of common knowledge in their own  
12 head?

13 A. No. That's almost a contradiction of  
14 terms. Because it is common so one person can't  
15 be -- it can't be one person.

16 Q. So common knowledge is sort of an average  
17 of what everybody knows?

18 A. It is -- I provided that definition  
19 before. I could restate it. The tide line is  
20 that what virtually every member of society would  
21 have it.

22 Q. Don't you think that different members of  
23 society have different reasons to look for and pay  
24 attention to different items in the news?

25 A. Yes, I believe that.

1 Q. So a smoker who is habituated and may be  
2 even a little worried about it is likely to notice  
3 things about smoking in the news more than some  
4 other person might?

5 A. Again, I think this is outside my  
6 expertise about what the field of psychology and  
7 whatever else. I'm not an attorney. I can't  
8 lodge an objection. I'm trying to point out that  
9 I can't help you much here.

10 Q. Do you think the common knowledge, as you  
11 have assessed it, would have been influenced by  
12 this document?

13 By the way, these documents are from  
14 Plaintiff's Exhibit 162, this one is from the  
15 Tobacco Institute, press release, March 12, 1982.  
16 I don't see a byline. It says, "Contact, William  
17 Towey (phonetic), Jr."

18 It says, "Lung cancer, like many other  
19 human cancers, remains a major biological  
20 mystery." 1982. "However, the biomedical  
21 experimentation does not support the smoking  
22 causation hypothesis. The data are of poor  
23 quality and uncertain verification and that  
24 situation is getting worse."

25 Do you think that kind of press coverage

1 might influence the common knowledge among people  
2 who were addicted smokers?

3 A. Again, if it got there, it might.

4 Q. Or this one, May 16, 1988. That's an  
5 interesting date. It coincides with the Surgeon  
6 General's Report on addiction. Claims that  
7 cigarettes are addictive, contradict common sense.  
8 Tobacco Institute, May 16, 1988. Common sense --  
9 I'm sorry. Talks about numbers of former smokers.  
10 It says, "These figures and common sense  
11 contradict any claim that smoking is an  
12 addiction."

13 A. That one, I don't think, to be honest,  
14 would affect people because, as I said, people  
15 know that smoking is addictive. What is that  
16 going to add or subtract? People know it to be  
17 the fact, that smoking is addictive.

18 Q. Using a companion release, I'm not sure  
19 the jury has seen this one. Same heading, "Claims  
20 that cigarettes are addictive, irresponsible and  
21 scare tactics."

22 Do you think a headline line that in a  
23 press release would catch the attention of an  
24 addicted smoker in 1988?

25 A. It -- it might. As I say, common

1 knowledge was that it was addictive.

2 Q. It says, "The claim that cigarette  
3 smoking causes physical dependence is the heart of  
4 the Surgeon General's Report. But this is also  
5 the heart of its weakness. After years of  
6 well-funded research, it has not been established  
7 that cigarette smoking produces a physical  
8 dependence to nicotine."

9 You are telling us that common knowledge  
10 is completely to the contrary at that point?

11 A. And I think it has been so for a while.

12 One thing to point out, and I haven't  
13 read this --

14 Q. I'm really not asking you for another  
15 expos, on the whole subject.

16 A. I'm trying to see the rest of the  
17 document, though.

18 Q. Is it not true that you have told us that  
19 common knowledge disagreed with what I quoted so  
20 far from this press release?

21 A. Let me read it again.

22 Uh-huh. Yeah.

23 Q. You would agree?

24 A. Yeah.

25 Q. It goes on, to finish it, "In fact, it

1 has been impossible to establish that the feelings  
2 persons have upon giving up smoking are anything  
3 but that which would be expected when one is  
4 frustrated by giving up any desired habit."

5 A. Uh-huh.

6 Q. You consider that, again, to be a  
7 statement contrary to common knowledge in 1988?

8 A. I do. I also don't -- I'm not aware that  
9 it got to Oregon. I didn't see it.

10 Q. Okay. Well, let's see if we can find an  
11 example similar that we know got to Oregon.

12 Are you familiar at all with a document  
13 that -- I will show one of the many versions of it  
14 available called "Facts you should know." This  
15 one happens to be enlarged from the New York  
16 Times, April 15, 1994.

17 A. Yeah.

18 Q. I will represent to you that the same  
19 document and the same words appeared in The  
20 Oregonian on the same date, all right?

21 A. Yes. It did appear in The Oregonian. I  
22 remember pulling it and putting it in a folder.

23 Q. You are familiar with the contents of  
24 this document?

25 A. Yeah.

1 Q. This document, as you know, says --

2 A. But actually I'm saying yes, but I don't  
3 know in detail. I know in general.

4 Q. All right. Well, if this document -- I  
5 will just find some parts of it to read here.

6 "Philip Morris does not believe cigarette  
7 smoking is addictive." Are you familiar with that  
8 statement by Philip Morris in April of 1994?

9 A. Yes. That part of it, I recall.

10 Q. All right. And you recall that statement  
11 is directly contrary to what you have told this  
12 jury was common knowledge for years by that time?

13 A. Right. I guess back to my chart here,  
14 too. It is the one you are pointing me to. The  
15 distinction I have made from time to time is  
16 between -- I will do the butcher block again, if  
17 you will. Common knowledge --

18 MR. GAYLORD: Could I have the question  
19 read back, please?

20 (The court reporter read  
21 as follows:)

22 "All right. And you recall that  
23 statement is directly contrary to what you have  
24 told this jury was common knowledge for years by  
25 that time?"

1           MR. GAYLORD: Did he answer that  
2 question?

3           THE WITNESS: I think I did.

4           MR. GAYLORD: Then in the interest of  
5 time, can we move on?

6 BY MR. GAYLORD:

7           Q. Doctor, in the materials that we were  
8 allowed to review this noon, I found -- I should  
9 give credit where credit is due. My friend,  
10 Mr. Thomas found, a stack of documents. Let me  
11 ask you -- I will show them to you so you can  
12 identify what I am looking at.

13           Is that your handwriting?

14           A. Selected Oregonian articles I went  
15 through --

16           Q. Slow way down. Court reporters can't go  
17 that fast.

18           A. Yes. Selected Oregonian articles. I  
19 went through a larger pile of articles which I had  
20 culled from the entire collection of newspaper  
21 articles, and I then made a selection of top  
22 articles. These are not chosen.

23           Q. And this stack with the rubber band  
24 around it is the stack that you chose not to use  
25 to demonstrate any points to the jury today?

1           A.    I'm not sure if that's the one -- no, no,  
2   no. These are the ones that, in fact, were --  
3   that's my letterhead -- the top articles. So, in  
4   fact, the examples from this one were in exhibits.

5           Q.    I'm puzzling over the last line. Didn't  
6   you say these were not chosen?

7           A.    Probably meant these were chosen. I  
8   can't tell you -- but I can tell you for sure,  
9   those are the top articles. You can, in fact,  
10   look through them, I believe, and find exhibits,  
11   if I'm not mistaken. But, listen, there are  
12   10,000 of those Oregonian articles. I went  
13   through them many times to try to cull them down  
14   to find ones which were illustrative on these  
15   points.

16          Q.    You did not cull any of these articles  
17   for illustrations of instances where the tobacco  
18   company, Philip Morris, or the Tobacco Institute,  
19   responded and denied all of the information being  
20   published about health risks, did you?

21          A.    I -- I wouldn't have excluded it. It was  
22   all of interest to me. Again, if you're asking me  
23   if the stuff -- if these press releases or  
24   statements ever got to Oregon, I was looking for  
25   information in the press about what people would

1 have gotten, and I didn't make any distinction  
2 between whether it was coming from the Tobacco --  
3 whatever it is called -- TIRC, or the American  
4 Cancer Society. It was all informative to me.

5 Q. These are all Oregonian articles?

6 A. Yes.

7 Q. This one is January 4, 1954?

8 A. I believe it is '64. Maybe I'm wrong.

9 Q. Well, I'll show you this. There is a  
10 1954 Philco TV on it, so I assume it is not a  
11 ten-year old ad.

12 A. Yeah, you got me there.

13 Oh, this one, I know quite well. Is that  
14 from that pile?

15 Q. It is from the top of that pile.

16 A. In fact, I was just looking over this  
17 article this week. Yeah, I know it pretty well.

18 Q. This is one of the articles that you --  
19 at least your letter said was not chosen for  
20 today's presentation.

21 A. Oh, I'm not sure that's the case. I  
22 presented a whole pile of potential exhibits. I  
23 went through them with defendant counsel and some  
24 got used and others didn't. We didn't want to use  
25 10,000 documents.

1 Q. I didn't see anything -- correct me if I  
2 am wrong -- I didn't see any of the contents of  
3 the things that you showed this morning with  
4 Mr. Randles that contained the responsive  
5 statements from Philip Morris or the Tobacco  
6 Institute.

7 A. I believe you are mistaken.

8 Q. All right.

9 A. I believe there are, in fact, articles, I  
10 am sure, in the January 11, '64. I'm saying I am  
11 sure. I know there were responses on that date.  
12 I would not have excluded it. I have no reason to  
13 exclude that. I am just trying to report what  
14 happened in the past.

15 Q. Okay. Well, in reporting what happened  
16 in the past, would it be worthwhile to take into  
17 account statements by the tobacco industry such as  
18 this one, "Eminent doctors and research scientists  
19 have publicly questioned the claimed significance  
20 of these cancer experiments."

21 A. Yes, absolutely. And let me say I did  
22 take these into account. And now you have given  
23 me an opportunity to -- thank you -- to elaborate.  
24 In the year -- I'm just dying to say something  
25 here.

1 THE COURT: Excuse me, Professor.

2 THE WITNESS: Sorry, Your Honor.

3 THE COURT: I really need to have you  
4 answer the question, please.

5 THE WITNESS: Yes.

6 THE COURT: Don't volunteer anything at  
7 this point.

8 Mr. Gaylord, will you just proceed.

9 MR. GAYLORD: Thank you.

10 BY MR. GAYLORD:

11 Q. In this article which we have identified,  
12 it says further, "The industry said it believes,  
13 the products we make are not injurious to health,"  
14 and added that statistics purporting to link  
15 cigarette smoking with lung cancer could apply to  
16 equal force to any one of many other aspects of  
17 modern life."

18 A. Yes. Right.

19 Q. Dr. May, I'm not sure I want to go  
20 through three inches of this, but this list of  
21 articles that you have marked as not chosen -- I  
22 will go through a few more. But this is in  
23 chronological order, isn't it?

24 A. To be honest, I don't know if it is in  
25 chronological order or not. I hope it is, for

1 your purpose. I believe it is in subject order.  
2 I believe, first, smoking and health. And then  
3 addiction. Then something called Oregon  
4 dimension. And then something -- that word I'm  
5 not supposed to mention. And addiction.

6 Q. Well, I see, you are right. There are  
7 subsections of it where it starts over at the  
8 beginning and goes through.

9 A. Right.

10 Q. Just a couple more, I think. June 17,  
11 1956.

12 MR. GAYLORD: Your Honor, a juror.

13 THE COURT: Ms. Dewees.

14 JUROR DEWEES: You are going to have to  
15 hold still more, if you put more things up.

16 MR. GAYLORD: Thank you.

17 THE COURT: Okay. Mr. Gaylord, I think  
18 it would be a good idea to have the afternoon  
19 recess at this point.

20 MR. GAYLORD: That's fine.

21 THE COURT: And then tighten things up.  
22 Leave your notes here, please. We will take 15  
23 minutes.

24

25

1 (Open court; jury not  
2 present.)  
3

4 THE COURT: Mr. Gaylord, how much more on  
5 cross, please?

6 MR. GAYLORD: 15 minutes.

7 THE COURT: Okay. And then redirect?

8 MR. RANGLES: 15 minutes.

9 THE COURT: Okay. Let's use the recess  
10 to try to get to the point. We are losing the  
11 jury. They are getting edgy. It is Friday  
12 afternoon and, Doctor, I don't mean to be rude,  
13 but we really need to have you stay on the  
14 question at this point.

15 There will be a redirect opportunity for  
16 you to elaborate, if it is important to the  
17 case. Believe me, I'm not trying to be  
18 offensive. I am just worried about this jury  
19 and getting out what we need to get done.

20 THE WITNESS: I think you are right.  
21 (Recess.)  
22

23 (Open court; jury  
24 present:)  
25

1 THE COURT: Jurors, I know it is really  
2 warm in here. There is apparently a broken heat  
3 valve in this room. It does its own thing,  
4 regardless of the temperature. If you are  
5 uncomfortable and can take another layer off,  
6 feel free to do that. I told the lawyers they  
7 could take their jackets off. They are not  
8 being disrespectful. They are just very  
9 uncomfortable.

10 Okay, Mr. Gaylord.

11 MR. THOMAS: Thank you.

12 MR. GAYLORD: I'm going to ask you to go  
13 back down to the screen. I think that's all I  
14 have to do left is four, five, or six more.

15 THE WITNESS: Yes, sir.

16 BY MR. GAYLORD:

17 Q. First I want to confess my mistake. I  
18 think I suggested that I had not seen anything in  
19 this morning's materials that you presented that  
20 had references in it to the tobacco industry's  
21 position. And then in the middle of the break I  
22 realized one of the things that I highlighted was  
23 from this morning's stuff.

24 So let me show you -- this is May 17,  
25 1988. This was one of the ones that I think you

1 and Mr. Randles went through on the computer  
2 presentation, "Nicotine and tobacco addictive  
3 drug, a report says."

4 A. Yes.

5 Q. It is obviously coverage of the Surgeon  
6 General's Report of May 16, 1988. And on the same  
7 page of The Oregonian it did include the tobacco  
8 industry position. So I beg your pardon, and I  
9 misstated that earlier.

10 A. Thank you, sir.

11 Q. What it says about the tobacco industry  
12 position, says, "The tobacco industry long has  
13 disputed the notion that nicotine is addictive.  
14 It fought successfully against inclusion of a  
15 warning about addiction in 1984."

16 MR. RANGLES: Objection, Your Honor. May  
17 we approach?

18 THE COURT: You may.

19

20 (Discussion at the bench  
21 off the record.)

22

23 THE COURT: All right. Jurors, we are  
24 ready to go back. Mr. Gaylord.

25 MR. GAYLORD: Thank you.

1 BY MR. GAYLORD:

2 Q. Dr. May, I'm finding where I left off.

3 "The Tobacco Institute, a lobbying  
4 association for the industry, said in a statement  
5 Monday, that the new report trivializes the  
6 serious drug problem faced by society."

7 That is in quotes.

8 And "The claims that smokers are addicts  
9 defy common sense and contradict the fact that  
10 people quit smoking every day," it concluded.

11 Now, your findings about common knowledge  
12 would disagree with that statement from the  
13 tobacco industry, wouldn't it?

14 A. Well, common knowledge suggests -- it was  
15 common knowledge that tobacco smoking was  
16 addictive. I didn't comment about the last thing  
17 that you mentioned. Two parts, about whether  
18 people could quit or not. And we do know there is  
19 lots of evidence that lots of people can quit,  
20 even if it is addictive.

21 Q. Well, the thrust of the part the tobacco  
22 industry released in their response to the Surgeon  
23 General's Report was that it is just not  
24 addictive?

25 A. Uh-huh. I agree.

1 Q. You are familiar with this?

2 A. Yes. Absolutely. Common knowledge would  
3 suggest otherwise.

4 Q. You are familiar with that being the  
5 position taken by Philip Morris and the tobacco  
6 industry numerous times in numerous articles in  
7 The Oregonian and elsewhere?

8 A. Yes, and I think your words were that  
9 they believed that it was not addictive; is that  
10 correct? Is that right? I'm sorry. I thought  
11 the word you said was "believe."

12 Q. You are referring to the, "Facts that you  
13 should know" ad in The Oregonian April, 1994?

14 A. I thought that statement said it. I may  
15 be wrong.

16 Q. Does your analysis of common knowledge  
17 take any account of missed statements of fact  
18 placed in the media for purposes of influencing  
19 consumers' knowledge?

20 A. I would -- if there are, indeed,  
21 misstatements, I would read them.

22 Q. Have you taken into account in your  
23 evaluation of the issue that you presented to the  
24 jury misstatements about the facts?

25 A. Well, I thought I just answered that.

1 Let me try again.

2 I looked at those. And even if they are  
3 misstatements, I take into account as coming into  
4 people's common knowledge.

5 Q. And what are some of the misstatements  
6 that you have taken into account then in this  
7 case?

8 A. Well, again, I'm not a scientist. So if  
9 people are making representations about science, I  
10 don't know what's a misstatement and what isn't a  
11 misstatement.

12 Q. Okay. Well, I'm sorry -- I thought you  
13 said that you did take into account any  
14 misstatements of fact that you encountered in your  
15 review.

16 A. Well, what I said was that if the  
17 statements are made -- I don't know of any  
18 misstatements or not. I simply take those into  
19 account, whether they are misstatements are not.  
20 I was trying to clarify, saying I'm not a  
21 scientist, so I don't know if a misstatement is  
22 being made or not.

23 Q. Okay. Just a couple more examples of the  
24 material in the stack of your materials that was  
25 labeled, "These were not chosen." This is from a

1 page -- again, this whole stack is Oregonian  
2 articles, is it not?

3 A. I believe so, yeah.

4 Q. And this one?

5 A. That's a stack of chosen articles,  
6 though, I think.

7 Q. Chosen or not chosen, there is a note on  
8 the front about that question?

9 A. Yeah.

10 Q. The Oregonian, June 8, 1995 headline is,  
11 "Tobacco giant researched nicotine's effects."

12 A. Yes. I, of course, took that into  
13 account.

14 Q. You recall this article?

15 A. Yes, absolutely.

16 Q. You took into account the statement --

17 MR. GAYLORD: We have a question from a  
18 juror, Your Honor.

19 THE WITNESS: I'm sorry. I have been  
20 warned before. I'm doing a bad job.

21 MR. GAYLORD: And the statement which is  
22 really hard to read --

23 BY MR. GAYLORD:

24 Q. "In 15 years of previously undisclosed  
25 research, the world's largest tobacco company

1 studied nicotine and found that it affected the  
2 body, brain, and behavior of smokers. That work  
3 is at odds with arguments by the company  
4 Philip Morris that nicotine should not be  
5 regulated under laws applying to drugs that affect  
6 the body."

7 Is that disclosure of 15 years of  
8 research about the nicotine effects on the body  
9 one of the statements that you took into account  
10 in determining what common knowledge is?

11 A. Yes, that's right. I said I took this  
12 article into account as contributing to common  
13 knowledge.

14 Q. In your method of assessing common  
15 knowledge, have you taken into account the fact  
16 that this kind of information might be 15 years  
17 old before it is disclosed to the public?

18 A. Well, can I just point out, and I'm sorry  
19 if I'm repeating myself again, that nicotine is --  
20 addictive properties was well-known in the late  
21 19th century, as well as the late 20th century.

22 Q. Of course, your task was not to assess  
23 Philip Morris' knowledge?

24 A. That's right.

25 Q. You were just talking about what is the

1 common knowledge?

2 A. Right. Not their knowledge and not their  
3 motives.

4 Q. Okay. And I think this is the last one  
5 I'm going to use from the stack.

6 MR. GAYLORD: And, by the way, Your  
7 Honor, and Counsel, I have marked the first page  
8 of this as a plaintiff's exhibit. I haven't put  
9 a number on it yet. I'm going to offer it; any  
10 objection?

11 MR. RANGLES: There are some objections  
12 we can take up out of the presence of the jury,  
13 Your Honor.

14 THE COURT: To the first page.

15 MR. GAYLORD: I want to offer the stack.  
16 We can discuss it later. 175.

17 THE COURT: The exhibit will be marked  
18 175. The objection will be taken up outside the  
19 jury's presence.

20 That may mean, Professor, that the  
21 materials stay here, but the lawyers can get  
22 them back to you later.

23 THE WITNESS: Thank you.

24 BY MR. GAYLORD:

25 Q. I'm not going to take the trouble to find

1 the beginning of this article from The Oregonian.  
2 Maybe it isn't in the stack. I'm not sure.

3 This is a continuation from Page D-1.

4 The date is here, January 3, 1997.

5 A. Uh-huh.

6 Q. Two months before Jesse Williams died.

7 "Smoking nicotine is as addictive as heroin or  
8 cocaine."

9 And we find the statement, "Not everyone  
10 agrees that nicotine is addictive. Walker  
11 Merryman, vice president of the Tobacco Institute  
12 in Washington, D.C. points to the Surgeon  
13 General's own report that says 90 percent of 38  
14 million smokers have quit over the years have done  
15 so by their own willpower. 'I think those figures  
16 alone and common sense contradict any claim that  
17 smoking is an addiction,' he said."

18 Did your analysis of these issues  
19 consider at all, Dr. May, whether statements like  
20 that, arguing that common sense proves nicotine is  
21 not addictive, had any negative impact on the  
22 ability of members of the common body,  
23 particularly addicted smokers, to accept the truth  
24 and deal with their addiction?

25 A. It did, actually. That's why I included

1 it in those folders. It seemed to me relevant  
2 information that the addicted properties of  
3 nicotine were well-known, and also that there was  
4 such a statement from a representative, so I took  
5 that into account.

6 Q. And I think one more example on this one  
7 comes out of a -- not chronological. I apologize  
8 for that. It is here because I also happened to  
9 get time to look at a stack called U.S. News and  
10 World Report.

11 A. Yes.

12 Q. That's out of that body. Is that one of  
13 the sources that you considered as having  
14 saturated as far as Oregon?

15 A. Well, it was, yes. It wasn't a source  
16 that we know from the depositions Mr. Williams  
17 read, so he didn't have any examples from here.  
18 But, in any event, that is a source that I looked  
19 at.

20 Q. To the extent that you are telling this  
21 jury about the common knowledge --

22 A. Yes.

23 Q. -- you are defining that as a broad  
24 concept of what people know?

25 A. That's correct.

1 Q. That's true?

2 A. That's correct.

3 Q. And you, in fact, I think made clear  
4 before, you are not in a position to say what  
5 Jesse Williams knew.

6 A. What he knew?

7 Q. Yes.

8 A. Well, I do believe -- I feel -- I feel  
9 I'm in a position to have reasonable certainty  
10 about what he knew. I wouldn't presume to say  
11 what he believed. I would never presume to say  
12 what he believed.

13 When talking about common knowledge, I am  
14 saying with reasonable certainty the populous at  
15 large knew this, and we also knew individual items  
16 about Mr. Williams from depositions.

17 Q. I think I may have misunderstood one of  
18 the things that you have been to tell me about,  
19 Doctor, and I am a slow student today. Let me see  
20 if I get it now.

21 You are using the word "know," what  
22 someone knows, or what everybody knew. When you  
23 say "know" or "knew," you are referring to had the  
24 information crossed their path?

25 A. Had the information crossed their path

1 would be the terminology I use -- remember the  
2 charts? The information is coming into their  
3 head. We know about cognitive science. These are  
4 signals being sent to various areas of the brain  
5 we can map.

6 Q. Okay. But you are not making an  
7 assessment of what they -- what either an  
8 individual or the whole group of society has  
9 accepted as true?

10 A. I use the word "believe." That would  
11 be -- pardon me -- the distinction that I was  
12 making.

13 Q. And you were not determining the answer  
14 to the question, what did they believe?

15 A. Determining, no.

16 Q. And with respect to this, one more source  
17 of information that may have come into the  
18 question what they knew, as you use it, this is an  
19 article from U.S. News and World Report,  
20 October 9, 1972, entitled "An Upturn in Smoking  
21 Despite All Warnings."

22 A. Uh-huh.

23 Q. Subtitled, "After a dip, the cigarette is  
24 regaining popularity. More young people are  
25 taking up the habit. Sales are breaking records."

1           And in the second column at the bottom,  
2    "Why is smoking becoming so popular?" We have an  
3    answer from a spokesman from the tobacco industry.  
4    Says a spokesman for the tobacco industry, "There  
5    are two possible reasons: First, it is just a  
6    normal increase. Western man has enjoyed tobacco  
7    for 300 years, and he likes it. Second, people  
8    don't want to believe that smoking is bad for the  
9    health. The questions raised concerning smoking  
10   are quite serious, but they have by no means been  
11   answered."

12           You have taken this article into account  
13   in your formulation of the position about what  
14   people know, and would you agree that the article  
15   I just cited from makes the distinction about what  
16   they believe?

17       A.   Yes, that's right.

18       Q.   Do you have any basis to dispute the  
19   inference from that article that there has been a  
20   significant gulf between what people know, that  
21   is, the information that has come to them, and  
22   what they believe, which would explain why smokers  
23   have continued to smoke and the number of smokers  
24   hasn't grown?

25       A.   I believe I mentioned a couple -- I had a

1 chart up there -- I don't know if I could  
2 find it-- that distinguishes between knowing and  
3 believing if you recall, or thinking, I think I  
4 put up there. And it can point to other  
5 possibilities: Risk-taking, liking it, and so  
6 forth. That might be an explanation.

7 But as I say, my charge was -- myself was  
8 understanding knowledge. Knowledge. And so I can  
9 only speculate about belief.

10 Q. Now, I have one last subject, sir. You  
11 made some statements about polling, particularly  
12 Gallup Poll from 1954.

13 A. Yes.

14 Q. Are you familiar with published articles  
15 about the use of Gallup Polling and the way you  
16 have used it in which the Gallup Poll people have,  
17 shall we say, responded to what they consider  
18 misuse of their polling information?

19 A. I have heard about it. I have not read  
20 the piece itself. I believe it is referring to  
21 one historian's testimony.

22 Q. Are you familiar with the article The  
23 Gallup Organization -- by The Gallup Organization,  
24 "The tobacco industry summons polls to the witness  
25 stand. A review of public opinion on the risk of

1 smoking. By Lydia Saad and Steve O'Brien of The  
2 Gallup Organization"?

3 A. I haven't read that.

4 MR. RANGLES: Objection, hearsay.

5 THE COURT: Mr. Gaylord, objection is  
6 hearsay.

7 MR. GAYLORD: It is for impeachment.

8 THE COURT: Impeachment how? Is it  
9 offered for its truth that the Gallup people are  
10 criticizing its use? If so, it is hearsay.

11 MR. GAYLORD: I want to be sure I know  
12 our source of it, Your Honor.

13 I need to ask some further questions.

14 THE COURT: Go ahead.

15 MR. GAYLORD: Foundation.

16 BY MR. GAYLORD:

17 Q. You said you have heard of this article?

18 A. That's correct. I have heard of the  
19 article.

20 Q. And I think you have indicated that you  
21 used some Gallup Polling for some of the positions  
22 that you have taken here today.

23 A. That's right. I have used some records  
24 from the Gallup Organization, the one cited there.  
25 I have the complete printout.

1 Q. As a historian, when you make use of and  
2 rely on polling results from an established --  
3 particularly an established polling organization,  
4 would you not consider the position of that  
5 polling organization on the proper use of its  
6 data?

7 A. Oh, absolutely.

8 Q. And you would consider that an  
9 authoritative source of information about proper  
10 usage of the data?

11 A. Well, two parts. I would consider that.  
12 Mind you, I also have -- do not know about  
13 whatever use was made of those data, but I  
14 examined the policy itself, looking through my own  
15 eyes in making determinations about it.

16 I hasten to add in my presentation I told  
17 you I don't place enormous reliance on polls. I  
18 think my point was that they confirm to a certain  
19 extent things that have already been saying about  
20 the state of common knowledge.

21 Q. Let me ask you this: In your use of  
22 Gallup Poll information from 1954 about what  
23 people knew and how many people --

24 A. Yes.

25 Q. -- knew something about smoking and

1 health, did you interpret that information as an  
2 indication that common knowledge included an  
3 awareness of the quality and quantity of the  
4 relationship between smoking and disease?

5 A. There are two issues here. Okay. I  
6 looked at the poll very closely. I think I can  
7 tell you the sample size, I can tell you the  
8 number of Oregon respondents. So I don't place  
9 relevance in the polls.

10 By the way, there are only nine  
11 Oregonians used in that poll. I told you before  
12 polling is indicative of some things, but it is  
13 not where I place the weight of my research.

14 So to answer your question, I looked at  
15 the data about -- there are two different  
16 questions. One was, have you heard, have you  
17 read?

18 Second one, in effect, do you think there  
19 is a connection? And the figures you have up  
20 there, have you heard, have you read? 89.9  
21 percent. Remember the pie chart? And that's what  
22 you saw.

23 The figures were a little lower for what  
24 you think about the link, whether its cause,  
25 whether it's a cause, lower, as one would expect.

1 It's in effect part of the debate and controversy,  
2 even within the scientific about the smoking and  
3 lung cancer risk. So I took all of that into  
4 account.

5 Q. Did you -- let me ask this in a yes or no  
6 way, so I can move on to the next question, if you  
7 will, Doctor.

8 A. Yes.

9 Q. Did you make some use of Gallup Polling  
10 results from 1954 on the question of whether there  
11 is common knowledge that cigarettes cause lung  
12 cancer?

13 A. You know, I'm pausing there because I  
14 think you are inflating two questions. Do you  
15 actually have the poll in front of you?

16 Q. I have an article in front of me that  
17 addresses the way the question has been asked in  
18 other cases as to the position of the Gallup  
19 people about whether that's an appropriate use of  
20 the poll?

21 A. My use of the poll itself --

22 MR. RANGLES: Objection, hearsay.

23 THE COURT: Mr. Gaylord, do not convey to  
24 the jury the content of the article in your  
25 questioning, in your aid of an objection. I so

1 far indicated I was concerned with the  
2 objection. Hearsay is well-founded.  
3 Proceed.

4 BY MR. GAYLORD:

5 Q. Okay. I think I left a question hanging.  
6 I will try to rephrase that question.

7 Did you or did you not use Gallup Poll  
8 information on the question --

9 MR. RANGLES: That's on the screen, Your  
10 Honor.

11 MR. GAYLORD: Sorry.

12 BY MR. GAYLORD:

13 Q. -- on the question of whether common  
14 knowledge says lung cancer is caused by smoking?

15 A. I think the answer to that question is  
16 yes.

17 Q. All right. And do you consider the  
18 article by the Gallup people about that polling  
19 result authoritative on the question of proper  
20 usage of polling?

21 A. Sir, I have not read the article. I told  
22 you that already, so I can't determine whether it  
23 is authoritative or not.

24 Q. Do you mean the gist of the criticism in  
25 the article?

1           A.    I really don't.  I assessed the document  
2 myself.  I have already told you I don't place a  
3 tremendous amount of emphasis on it in my  
4 presentation of it or my thinking about it.

5           MR. GAYLORD:  May we approach, Your  
6 Honor?

7           THE COURT:  Yes.

8                               (Discussion at the bench  
9                               off the record.)

10          MR. GAYLORD:  Thank you, Dr. May.

11          THE COURT:  Dr. May, would you take the  
12 witness stand.

13          MR. RANGLES:  Actually, Your Honor, I  
14 would like him there for my first question.

15          THE COURT:  As long as you are brief in  
16 redirect and cover matters that are redirect.  
17 To the point, please.

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## REDIRECT EXAMINATION

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BY MR. RANGLES:

Q. Professor May, you recall several questions in Mr. Gaylord's examination about whether you considered statements by the tobacco industry or representative of them regarding the risk of cigarette smoking? Do you recall those questions?

A. Yes.

Q. I believe you offered four times to explain to Mr. Gaylord how you took that information into account and he declined to take you up on your offer. I'm going to take you up on that offer.

MR. GAYLORD: Objection; I think that mischaracterizes it.

THE COURT: Objection overruled. The jury can draw its own conclusions. But it is really not necessary for either side to characterize the motives of counsel in the form of a question. It is an argumentative statement.

Go ahead.

1 BY MR. RANGLES:

2 Q. Would you tell the jury what you wanted  
3 to tell them about how you took the tobacco  
4 industry statements into account in formulating  
5 your opinion.

6 A. Okay. Sure. And I will use this in a  
7 second.

8 I was sensitive to this issue about the  
9 extent to which the common knowledge would be  
10 influenced in Oregon by such statements. I saw  
11 them in the press from time to time. So I took it  
12 upon myself to go through The Oregonian and  
13 identify articles which were raising issues about  
14 health consequences of cigarette smoking, and then  
15 analyzing them, determining whether or not there  
16 were -- there was information, replies, whatever,  
17 from the TIRC, Tobacco Institute, in different  
18 periods of time.

19 Just to give you some examples, some  
20 findings. In 1961, it is a down time. There  
21 aren't major revelations here, but there is some.  
22 Some regular stories.

23 There were 14 stories about the health  
24 consequences of tobacco smoking in The Oregonian.  
25 There were zero references to TIRC -- I guess it

1 would have been Tobacco Institute at that time.  
2 I'm not -- I'm not sure. But zero. So these  
3 stories, most of them are local stories, but there  
4 would be and other items.

5         You have hear of Dear Abby. Dear Abby  
6 was a crusader on the tobacco issue. There was a  
7 Dr. Mulner, who was a local doctor who wrote for  
8 the press. Zero replies. And when there were,  
9 there stories were mostly Oregon-generated  
10 stories. Some professor at OHSU does some  
11 research and, of course, there would be no reply.

12         I also did for other years -- did you  
13 have a follow-up question?

14         Q. Yeah. My follow-up question was what you  
15 anticipated. Were there years in which there were  
16 replies? Can you give us, very briefly, an  
17 example of one of those years?

18         A. Absolutely. Also, I included to such  
19 efforts by the Tobacco Institute to get their case  
20 through.

21         1954. That's, of course, a crucial year.  
22 There were 38 such articles dealing with the  
23 health consequences of smoking -- that's the year  
24 the ASC study occurred. I don't know if you got  
25 this at all, they dealt with this at all in court,

1 something called The Frank Statement.

2 You are nodding your heads.

3 Q. We talked about that. You can proceed.

4 A. Frank Statement, January 4, 1954. 38  
5 articles. You actually talked about it. Good.  
6 Usually my students at University of Oregon, I  
7 can't assume that much.

8 On the day -- if I include The Frank  
9 Statement among these 38, okay, that's one point  
10 TIRC is weighing in. We have one. Frank  
11 Statement.

12 If we include the story, I think you saw  
13 here, about The Frank Statement is coming forward,  
14 that's another point in which the TIRC weighs in  
15 in some way.

16 If you count the story -- I don't know if  
17 you have information about this -- later in the  
18 year when the research director is appointed --  
19 does this sound familiar? And they start the  
20 research from the TIRC, and you have -- that was  
21 one of the principal functions of it. That's  
22 three.

23 And there was one later story in the year  
24 in which there was a comment by a man named  
25 Hartnett from the TIRC about some findings.

1           That's four. That's it. 4 out of 38.  
2   And the rest of the stuff was devastating, at  
3   least from my point of view. Very unfavorable  
4   coverage about tobacco and cigarettes. So the  
5   message, in my view, was getting through.

6       Q.   In the interest of time, I want to jump  
7   to another subject, Professor May. I want to go  
8   to this web page that Mr. Gaylord showed you.

9       A.   Yes.

10      Q.   I believe you testified this was prepared  
11   by an undergraduate?

12      A.   That's right. Ronnie Lee. I will speak  
13   to her as soon as I get back home.

14      Q.   I believe there was a statement on it  
15   that you said was incorrect. I want to see if I  
16   can find it. Was it the current research and  
17   writing, general history of the Philippines?

18      A.   Oh, no. I don't know where that came  
19   from.

20      Q.   What are you working on in your current  
21   research and writing?

22      A.   I'm doing a research history of cancer in  
23   the United States. That's what I am doing, and I  
24   have been doing for more than a year.

25      Q.   Professor May, you can return to the

1 stand now.

2 A. (Witness complies.)

3 Q. Professor May, Mr. Gaylord showed you, I  
4 believe snippets, I believe two out of the five  
5 textbooks that you talked about in your direct  
6 examination. Did anything that Mr. Gaylord showed  
7 you out of those textbooks change your opinion  
8 about whether those textbooks conveyed smoking was  
9 highly dangerous to health?

10 A. No.

11 Q. Did anything that he showed you change  
12 your opinion as to whether those textbooks  
13 conveyed smoking to be addictive?

14 A. No.

15 Q. Professor May, do you feel that you have  
16 adequately researched and studied the question of  
17 common knowledge of the public about tobacco use  
18 and health over the last 100 years to render your  
19 opinions here today?

20 A. Oh, yes.

21 Q. Have you conformed with good research  
22 practice for historians?

23 A. Yes.

24 Q. Do you teach courses in American history?

25 A. I do. I teach the U.S. Survey course at

1 the University of Oregon.

2 Q. Did the fact that you worked with lawyers  
3 in preparing for your testimony today or the fact  
4 that you were paid for your time to study this  
5 question and your time to come here and testify,  
6 did either of those facts affect the testimony  
7 that you were giving here today?

8 A. They didn't.

9 Q. Are the opinions that you have given this  
10 jury today your own?

11 A. Yes.

12 Q. And did anything that you heard on  
13 cross-examination change your opinion about the  
14 state of common knowledge of the public about the  
15 health risks of smoking?

16 A. No.

17 Q. Did anything that you heard on  
18 cross-examination change your opinions about the  
19 state of common knowledge among the public about  
20 the addictiveness of smoking?

21 A. No.

22 MR. RANGLES: Thank you, Professor May.  
23 We appreciate your testimony.

24 THE COURT: Jurors, I'm going to ask you  
25 to step out because I have to take up one short

1 matter before we move to the next presentation.  
2 We are going to work until 5:00 tonight. Just  
3 so you know, we will get as much as we can.  
4 Leave your notes here, please.

5

6 (Open court; jury not  
7 present.)  
8

9 THE COURT: We had some argument at the  
10 bench here that was not on the record, and I  
11 want to summarize that for the record and give  
12 Mr. Gaylord an opportunity to make an offer of  
13 proof.

14 He was cross-examining the professor  
15 regarding an apparent objection by the Gallup  
16 Poll people through the manner in which their  
17 poll has been used in tobacco litigation, which  
18 apparently is a manner consistent with how it  
19 was used in direct examination, or at least  
20 allegedly consistent.

21 The objection was hearsay. I asked  
22 Mr. Gaylord what was the purpose for which the  
23 question was being asked. In other words, was  
24 it being asked to show that Gallup disapproved  
25 of the manner in which their poll was being

1 used, and he said yes. That means it is being  
2 offered for its truth, and, therefore, it is  
3 hearsay.

4 That's where the record is at this point.

5 MR. GAYLORD: I apologize, Your Honor.

6 If I could have a continuing moment here, I want  
7 to make sure.

8 May I just see if I can establish any  
9 sort of a better foundation for it, Your Honor,  
10 and then make my best pitch?

11 Dr. May, I want to go back to where we  
12 were a moment ago about this Gallup organization  
13 article called, "The tobacco industry summons  
14 polls to the witness stand, a review of public  
15 opinion on the risks of smoking," and it was  
16 identified further earlier. It is dated May 15,  
17 1998.

18 You have a general awareness of the fact  
19 that this article has been published?

20 THE WITNESS: Yes.

21 MR. GAYLORD: Do you have a general  
22 awareness of the fact that this article by The  
23 Gallup Organization criticizes the use of the  
24 Gallup Polling information to claim that 1954  
25 common knowledge was that cigarettes caused lung

1 cancer?

2 THE WITNESS: Actually, I don't have that  
3 specific knowledge. I'm sorry. I don't.

4 MR. GAYLORD: Do you know the name of the  
5 individual who was being singled out for  
6 criticism in the article?

7 THE WITNESS: It was an Australian. Oh,  
8 gosh.

9 MR. GAYLORD: Dr. Ford?

10 THE WITNESS: Was it? Lacy Ford. I  
11 don't know the person.

12 MR. GAYLORD: You are aware the article  
13 was published criticizing Dr. Lacy Ford for  
14 taking the position in an R.J. Reynolds' tobacco  
15 case very similar to the position that you have  
16 taken here today?

17 THE WITNESS: The details, I'm not aware.  
18 As I say, I have only vague knowledge of it. I  
19 have never seen the article.

20 MR. GAYLORD: How long have you been  
21 aware of the article?

22 THE WITNESS: Maybe two weeks or three  
23 weeks. Something of that nature.

24 MR. GAYLORD: Before using a Gallup  
25 Polling from 1954, the way you have here today,

1 would you want to know what The Gallup Poll  
2 Organization said about that usage?

3 THE WITNESS: In the best of all possible  
4 worlds, I would. I looked at the poll, however,  
5 even before I became aware of that article. As  
6 I said, I did not place much emphasis on polls.

7 MR. GAYLORD: In your ordinary work as a  
8 historian, if you learned about an article  
9 regarding some polling that you were using or  
10 thinking of using in a presentation, would you  
11 check the article before giving the  
12 presentation?

13 THE WITNESS: Certainly, I would -- I  
14 would try to, in the best of all possible  
15 worlds. In preparation for this, I was checking  
16 through millions of different things.

17 MR. GAYLORD: When you say you would try  
18 to check it, is that because you would give  
19 credence to what the polling organization said  
20 about proper use of it at the poll?

21 THE WITNESS: Not necessarily. I would  
22 want to come to my own independent judgment of  
23 it. I have used those data. I have read  
24 through those data. I would like to know what  
25 was said about it -- about them. "Data" being

1 plural.

2 MR. GAYLORD: When did you gather the  
3 Gallup Poll information that you used in this  
4 case?

5 THE WITNESS: Gosh, I would say about a  
6 year ago, perhaps. Let's see, what is it now?  
7 Maybe ten or eleven months ago. Something to  
8 that effect.

9 MR. GAYLORD: I think all I'm going to  
10 do, Your Honor, is offer the paragraph, give it  
11 to the court reporter.

12 THE COURT: Read it into the record right  
13 now.

14 MR. GAYLORD: I want to make sure I find  
15 enough context for this. I don't want to read  
16 that much.

17 On the basis -- I'm either going to have  
18 to read a whole page -- I think a copy of it  
19 might be a better idea, if you don't mind.

20 THE COURT: Okay. It is your offer of  
21 proof.

22 MR. GAYLORD: I will make it a Court  
23 exhibit and give a copy to the court reporter.

24 THE COURT: The objection is hearsay. Do  
25 you have an argument in opposition to the

1 objection?

2 MR. GAYLORD: My best shot is to suggest  
3 that it is offered for notice. I will make two  
4 statements. It is offered for notice to this  
5 witness as to what it says, even though he  
6 hasn't gone to look at it because he is aware of  
7 it, and it sort of begs him to look at it  
8 because of its nature.

9 And, secondly, it is inherently  
10 authoritative on the subject of using Gallup  
11 polls the way he is using them when we are  
12 talking about the same polling information. We  
13 are talking about the same testimony as the page  
14 I will show. And we're talking about a  
15 criticism that says that's an improper use of  
16 it.

17 THE COURT: Well, clearly, if Gallup --  
18 Mr. Gallup or Ms. Gallup was here -- somebody  
19 who is an admissible form of that evidence, it  
20 would be relevant. The point is, it is an  
21 article or it is an out-of-court statement, the  
22 truth of which you are seeking to have the jury  
23 accept, which is to say that Gallup does not  
24 approve of this usage of their data.

25 If it is being offered for its truth and

1 it is an out-of-court statement, it is hearsay,  
2 unless it falls within an exception, it is  
3 excluded under Rule 803. The objection is still  
4 sustained.

5 Okay. We need to get going, folks,  
6 because our day is a wasting.

7 The witness may be excused, but this  
8 exhibit that Mr. Gaylord marked during his  
9 testimony is going to need to stay as long --  
10 for us to deal with it outside the jury's  
11 presence, which we can't deal with this  
12 afternoon. We will commit, sir, to get the  
13 material back to you through the lawyers who are  
14 retaining it.

15 THE WITNESS: Thank you.

16 MR. THOMAS: Procedural matter. The  
17 underlying data upon which he said he bases his  
18 opinion in regard to The Oregonian articles and  
19 the rest of it that has come into the state of  
20 Oregon has been brought into the courtroom and  
21 filled six boxes and displayed to the jury.  
22 This underlying data is a source of great  
23 interest to the plaintiff's team, which we would  
24 like to examine for ourselves.

25 THE COURT: You may.

1 MR. THOMAS: And use possibly in  
2 rebuttal.

3 THE COURT: I'm not going to say you may  
4 use it, but the material is available still for  
5 examination.

6 MR. THOMAS: We request to have prepared  
7 a pick-up of this material at 5:00 p.m. by a  
8 copy service.

9 THE COURT: The material can stay in the  
10 courtroom and can be used by you, but it is the  
11 witness' material.

12 What, Mr. Randles? This body language  
13 thing, folks, has got to stop. Let me  
14 concentrate on what one person is saying before  
15 we get into the, "Teacher, teacher, I need to  
16 talk" stuff.

17 Yes.

18 MR. RANGLES: My question is logistical.  
19 Must it stay here the entire trial or may the  
20 witness take it back to Eugene when he leaves?

21 THE COURT: The plaintiffs get a fair  
22 opportunity to review all the material that the  
23 witness considered in forming his opinion. He  
24 brought seven boxes, is what he brought. They  
25 can't be expected to have digested that briefly

1 in the brief time that was available between  
2 direct and cross. So the materials are  
3 available.

4 It is his material and I don't want it  
5 out of the building. I think if you want access  
6 to it tomorrow in this courtroom, we will  
7 arrange to have security let you in, and you can  
8 work at it here. It needs to stay here. And  
9 then when they are done, you can have it back.

10 MR. GAYLORD: Is there any objection to  
11 taking any portions of it that are really  
12 pertinent upstairs to copy at the law library  
13 and bring it back?

14 THE COURT: It can stay in the building,  
15 that's reasonably secured.

16 MR. TAUMAN: If we can agree on a copy  
17 service --

18 THE COURT: You can always agree on  
19 something outside of the rulings. But just for  
20 the integrity of the witness' material, it  
21 should stay here in one place. And then if you  
22 want access to it tomorrow, and you are saying  
23 yes, Dan will work on letting security know that  
24 you are to be let into the courtroom tomorrow.  
25 This room is not being used for the classroom

1 law project because of this trial. Both sides  
2 can be here, for that matter.

3 Would you go get that started and let  
4 them know that lawyers from either side of the  
5 case -- and talk to Mr. Tauman. Find out who it  
6 is going to be so we get a specific order as to  
7 who's going to be in the courtroom. And then we  
8 will take up the issue about this other exhibit  
9 later. We have got to get this other piece of  
10 testimony done before five o'clock. Okay.

11 MR. TAUMAN: Thank you.

12 THE COURT: Ready to go on with the  
13 reading?

14 MR. DUMAS: Yes. We have two depositions  
15 to read. Our best guess is they are about half  
16 an hour each.

17 THE COURT: If we get started, we may get  
18 there.

19 Bring in the jury, please.

20 MR. DUMAS: Your Honor, this is Mr. Henry  
21 Klein from our office. He will be reading the  
22 part of the witness.

23 THE COURT: Good afternoon, Mr. Klein.

24 MR. GAYLORD: For the record, Exhibit 175  
25 that we marked, I'm going to give to the clerk.

1 Mr. Randles has made it clear he thinks there is  
2 stuff that he thinks shouldn't be in evidence.  
3 I think there is stuff that we need to talk  
4 about.

5 THE COURT: Let me suggest this --  
6 (Discussion at the bench  
7 off the record.)

8  
9 (Open court; jury  
10 present.)

11  
12 THE COURT: All right. Jurors, we are  
13 ready to proceed with the next presentation on  
14 behalf of the defendant. As I understand it,  
15 there is going to be a reading of deposition  
16 testimony from Henry Williams.

17 Seated at the witness stand is John  
18 Klein, who will be reading the answers given  
19 under oath by Henry Williams, who is the brother  
20 of the decedent.

21 The day of the testimony, Mr. Dumas?

22 MR. DUMAS: August 26, 1998, taken in  
23 Texas.

24 THE COURT: All right. Go ahead,  
25 Mr. Dumas.

1 MR. DUMAS: Thank you.  
2 Starting at Page 6, Counsel, Line 14.

3  
4 HENRY F. WILLIAMS  
5 was thereupon called as a witness on behalf of the  
6 Defendant and, after having been first duly sworn,  
7 was examined and testified as follows:

8  
9 DIRECT EXAMINATION

10  
11 BY MR. DUMAS:

12 Q. Could you state your full name for the  
13 record, please.

14 A. Henry F. Williams.

15 Q. And what is your date and place of birth?

16 A. 12/4/36, Houston County, Crockett, Texas.

17 Q. And are you the brother of Jesse D.

18 Williams?

19 A. I am.

20 Q. Have you lived in Crockett all your life?

21 A. No.

22 Q. Okay. Where else have you lived?

23 A. I lived in Crockett from 1936 to 1955. I

24 went in the military in 1955 to '59, and I lived

25 in Omaha from '59 to '61. Then I went to

1 Portland, Oregon in 1961, lived there until 1980.  
2 Q. Okay. What was the cause of death of  
3 your mother?  
4 A. My mother -- I think she died of cancer.  
5 Q. Was she a smoker?  
6 A. No. She died of -- it is a combination  
7 of cancer and pneumonia.  
8 Q. What was the cause of death of your  
9 brother Freddy?  
10 A. Cancer.  
11 Q. Was Freddy a smoker?  
12 A. Yes.  
13 Q. Do you recall what type of cancer he died  
14 of?  
15 A. I don't know the specific kind.  
16 Q. You moved from Crockett in 1955 when you  
17 joined the military, right?  
18 A. Yes.  
19 Q. Did your mother discuss smoking with you  
20 prior to you joining the military?  
21 A. Yes.  
22 Q. Do you recall how much before?  
23 A. Well, from childhood my mother -- smoking  
24 was forbidden for any of the kids in our family.  
25 Q. How did they tell you that smoking was

1 forbidden, how did you know that?  
2 A. "Don't smoke," that simple.  
3 Q. Was it your mother or your father who  
4 would tell you?  
5 A. My mother.  
6 Q. Did she tell all the kids?  
7 A. Yes.  
8 Q. Did you hear her tell all the kids?  
9 A. Yes.  
10 Q. You heard her tell Jesse?  
11 A. Yes.  
12 Q. Do you recall when she told Jesse?  
13 A. No, I don't recall when. It was an  
14 every-so-often thing, it was just --  
15 Q. Was it while you were still living at  
16 home in Crockett?  
17 A. Yes.  
18 Q. Did she tell you why they were forbidden?  
19 A. Yes. She said that they were harmful to  
20 you. She said that they would kill you.  
21 Q. Did your father ever say anything to you  
22 about smoking?  
23 A. No.  
24 Q. Other than your mother telling you and  
25 hearing about the Surgeon General's Report, have

1 you ever heard from anywhere else that smoking  
2 could damage your health?

3 A. Well, yes.

4 Q. What other sources have you heard that  
5 from?

6 A. I have heard it from newspapers. I  
7 mean -- magazines, newspapers, television, which  
8 the televisions were controversial.

9 Q. Sorry. What do you mean by "televisions  
10 were controversial"?

11 A. Well, one would say that it is not and  
12 the other would say that it is, so --

13 Q. Are these news reports that you are  
14 referring to?

15 A. Yes.

16 Q. Have you heard the message that smoking  
17 may be bad for your health repeatedly over the  
18 years?

19 A. Yes.

20 Q. Did you hear that at school?

21 A. Yes.

22 Q. Did your teachers tell you that smoking  
23 is bad for you?

24 A. They didn't necessarily say it was bad  
25 for you. It was forbidden. I mean, if you were

1 caught smoking, it was like doing a hideous crime  
2 at this day and age, then, you know --

3 Q. Would you get chastised at school if you  
4 were caught smoking?

5 A. (Witness nods.)

6 MR. DUMAS: The witness nods his head.

7 THE WITNESS: With the pants down, with  
8 the spanking.

9 BY MR. DUMAS:

10 Q. That was the punishment, being spanked?

11 A. Yes.

12 Q. Did they tell you why it was bad?

13 A. Yes.

14 Q. What did they tell you?

15 A. They said it was harmful to your health,  
16 and if they would go further, they would always  
17 say that it would cause your lungs to become dark,  
18 and whatever is caused from the smoke living in  
19 your lungs. That's what they used to tell us.

20 Q. Did they tell you that it would kill you?

21 A. Yes.

22 Q. Where did you go to high school?

23 A. Here in Crockett.

24 Q. What was the name of the high school?

25 A. Ralph Bunch High School, after the late

1 Ralph Bunch.

2 Q. What school did you attend prior to Ralph  
3 Bunch?

4 A. I started out at a country school by the  
5 name of Gudblye.

6 Q. What were the approximate dates that you  
7 attended Gudblye School?

8 A. Well, I started from the earliest date I  
9 started to school, which was a approximately 1942.  
10 I went to school there for three years,  
11 approximately, and transferred to Crockett School  
12 at the third grade.

13 Q. Okay. And then did you stay at the  
14 Crockett School until you went to Ralph Bunch High  
15 School?

16 A. They changed, yes. I went to Crockett  
17 School until they changed the name of Crockett  
18 School.

19 Q. Did any of your siblings attend these  
20 same schools?

21 A. Yes.

22 Q. Did they all attend these schools?

23 A. The two younger didn't attend Gudblye.  
24 The two younger started at Crockett.

25 Q. Okay. So Henry, Louise, Angeline, Jesse

1 and Freddy did attend both Gudblye --  
2 A. Yes.  
3 Q. -- and Crockett School?  
4 A. Yes.  
5 Q. And Ralph Bunch?  
6 A. Yes.  
7 Correction. Jesse, Freddy, Louise and  
8 Angeline did not go to Ralph Bunch School. The  
9 name was changed after they had graduated, I  
10 believe, so they went to Crockett.  
11 Q. Same school?  
12 A. Same school, different name.  
13 Q. Okay. Which of these schools were you  
14 taught that smoking could kill you?  
15 A. I would say probably at Ralph Bunch.  
16 Q. Did you graduate from Ralph Bunch?  
17 A. Yes, I did.  
18 Q. What year?  
19 A. 1955.  
20 Q. So it would have been sometime prior to  
21 1955 that you were taught by teachers that smoking  
22 could kill you?  
23 A. Yes.  
24 Q. Tell about me discussions you had with  
25 Jesse over the years about smoking/health.

1       A.    Jesse and I were not as talkative about  
2 situations that were personal to him. The last  
3 time I recall that we had a conversation about  
4 smoking was when he came home, and the last time  
5 he came home, which was approximately in late '80s  
6 or early '90s, and we were sitting on the porch  
7 and he and Mayola were sitting on the porch and we  
8 had a suggestion about cigarettes and he -- we got  
9 into a heated argument and he walked off the porch  
10 and walked down the street and came back. That  
11 was the last time that I had ever -- we had a  
12 discussion about cigarettes.

13       Q.    What did you discuss during that  
14 conversation?

15       A.    I told him that he should quit.

16       Q.    Did you tell him why he should quit?

17       A.    Yes.

18       MR. THOMAS: Counsel. (Counsel confer  
19 with each other.)

20       MR. DUMAS: Just a moment, Your Honor.

21 BY MR. DUMAS:

22       Q.    Did you tell him why he should quit?

23       A.    Yes.

24       Q.    What did you tell him?

25       A.    I told him that it was killing him,

1 because he was coughing. Every time he would  
2 light a cigarette, he would cough and tears would  
3 come to his eyes. He was coughing so much.

4 Q. Did he know it was killing him, smoking?

5 A. Yes.

6 Q. Did he ever tell you that he knew smoking  
7 was killing him?

8 A. He refused to talk about it.

9 Q. What did Mayola say? What part did she  
10 take in this conversation?

11 A. She wanted him to quit, and she was on my  
12 side, and he told both of us after our heated  
13 conversation to just get out of his business and  
14 leave him alone, because we didn't understand.

15 Q. Did he tell you he couldn't quit?

16 A. He didn't say in those particular words.  
17 He said that we didn't understand.

18 Q. Did he ever tell you that he wanted to  
19 quit?

20 A. I can't remember him using those  
21 particular words, no.

22 Q. Do you know if he ever attempted to quit?

23 A. At one time I think that he tried, that I  
24 know of.

25 Q. When was that?

1       A.    This was back in, oh, shucks, had to be  
2   in the '70s, maybe '75 or '76, something like  
3   that.

4       Q.    What do you recall specifically about  
5   that attempt to quit?

6       A.    I used to see him. I saw him one morning  
7   at the Denny's Restaurant, and I was on him again.  
8   And he said that I shouldn't be on him that hard  
9   because he was trying to quit.

10      Q.    Was this in Portland?

11      A.    Yes.

12      Q.    That was when you were residing in  
13   Portland?

14      A.    Yes.

15      Q.    Did you tell him then why he should quit?

16      A.    Did I tell him why he should quit?

17      Q.    Yes, sir.

18      A.    I asked him, I said, "Are you really just  
19   saying this or are you really going to quit?" And  
20   he said, "I'm trying," and that was it. It was  
21   about a few words, and that was the end of our  
22   conversation, as far as --

23      Q.    Did he tell you what he was doing trying  
24   to quit?

25      A.    Yes. He was taking -- what do you call

1 those -- chewing gum.  
2 Q. The Nicorette gum?  
3 A. Well, I don't know if it was Nicorette.  
4 Q. Or nicotine gum?  
5 A. He was chewing to keep from trying to --  
6 Q. Was he doing anything else?  
7 A. That's all I remember he said.  
8 Q. Did you ever see him taking the gum?  
9 A. No. I wasn't around him that much.  
10 Q. When was the first time that you saw  
11 Jesse smoking?  
12 A. Lord, I can't remember. It had to be --  
13 it had to be when he came home from the service,  
14 on leave from the service.  
15 Q. When, approximately, was that?  
16 A. About 1951, or something like that, '50  
17 or '51.  
18 Q. Did you ever see him smoke before he went  
19 into the service?  
20 A. No.  
21 Q. What brand of cigarettes was he smoking  
22 when he came back from the service?  
23 A. I can't remember.  
24 Q. Do you remember any brands of cigarettes  
25 that Jesse smoked throughout his life?

1 A. Marlboro Lights.  
2 Q. Marlboro Lights. Do you recall him  
3 smoking any other brands?  
4 A. No.  
5 Q. Well, were the cigarettes that he smoked  
6 filtered or unfiltered?  
7 A. Filtered.  
8 Q. Did he ever smoke menthol cigarettes?  
9 A. I don't know.  
10 Q. Not to your knowledge?  
11 A. No.  
12 Q. How much would he smoke a day?  
13 MR. THOMAS: Was that an incorrect  
14 question?  
15 MR. DUMAS: I think so. Strike that  
16 question. There is no answer.  
17 Page 46, Line 2.  
18 BY MR. DUMAS:  
19 Q. When did Jesse leave Crockett?  
20 A. Approximately 1948.  
21 Q. When did Jesse enter the military?  
22 A. If my recollection is correct, it was  
23 approximately 1948. I don't know which month.  
24 Q. Did he ever serve overseas?  
25 A. Yes.

1 Q. Where did he serve?  
2 THE COURT: Can you give him a page,  
3 please?  
4 MR. DUMAS: 48, Line 2. Your answer is  
5 at Line 23.  
6 THE READER: My section is crossed out.  
7 MR. THOMAS: So is mine.  
8 MR. DUMAS: Mine's not. I will strike  
9 the question.  
10 Page 60, Line 23.  
11 BY MR. DUMAS:  
12 Q. Did you ever hear anybody else tell Jesse  
13 he should quit?  
14 A. Yes.  
15 Q. Who did you hear tell him?  
16 A. His wife -- my sister.  
17 Q. Which sister?  
18 A. The one that's passed, Angeline.  
19 Q. When did she tell him?  
20 A. When he came home the last time.  
21 Q. And when was that? I can't remember what  
22 you said earlier.  
23 A. Approximately 1991, or something around  
24 that area.  
25 Q. Did you hear the conversation?

1 A. Yes.  
2 Q. What did Angeline tell him?  
3 A. "Boy, you ought to quit."  
4 Q. Did she tell him why?  
5 A. Because he was coughing.  
6 Q. What was Jesse's reaction?  
7 A. He said, "I'm going to try."  
8 Q. Do you know if he did try?  
9 A. I don't know. I assume that he tried,  
10 but he never succeeded, and that's one thing I  
11 know for sure.  
12 Q. Did you hear Mayola get on him about  
13 smoking on more than one occasion?  
14 A. Yes.  
15 Q. Did she constantly get on him?  
16 A. I think being a caring -- the few times I  
17 was around and I was privileged to hear the  
18 conversation, I think that she was very demanding  
19 as far as his trying to get him to quit. I  
20 believe she was.  
21 MR. DUMAS: Excuse me. Page 63, Line 4.  
22 BY MR. DUMAS:  
23 Q. What would she tell him when she would  
24 get on him about quitting?  
25 A. I can't remember the words verbatim, but

1 I know they used to have the arguments about his  
2 quitting smoking and Jesse would storm upstairs.  
3 He wouldn't let you talk to him about it because  
4 he knew he couldn't quit. And he had no answers  
5 to the questions.

6 Q. What did he say about not being able to  
7 quit?

8 A. He wouldn't talk about it. He just said  
9 I didn't understand.

10 Q. I'm sorry?

11 A. He would only say that I didn't  
12 understand.

13 Q. Did you ever ask him what he meant by  
14 that?

15 A. He wouldn't elaborate on it. When I  
16 asked him, he would clam up.

17 Q. So he really didn't want to talk about  
18 quitting?

19 A. I think underneath all the pressures, I  
20 think he wanted to talk about it, but I think that  
21 he refused to talk about it because I don't think  
22 that he was -- he really knew a way out.

23 Q. What would Jesse say to Mayola when she  
24 tried -- strike that.

25 What did Jesse say to Mayola when she

1 told him to quit smoking?  
2 A. Leave him alone.  
3 Q. That was it? Anything else?  
4 A. (Witness shakes his head.)  
5 MR. DUMAS: Witness shakes his head.  
6 BY MR. DUMAS:  
7 Q. So he really didn't want to talk about it  
8 with Mayola?  
9 A. Huh-uh.  
10 Q. When Jesse came back from the service on  
11 leave, what did other members of your family tell  
12 him about smoking?  
13 A. I can't recall.  
14 Q. Did your mother get on him when he came  
15 back in from the military?  
16 A. He would sneak and smoke. He wouldn't  
17 smoke around Mother that much.  
18 Q. He would hide smoking from your parents?  
19 A. Yeah.  
20 Q. Is that because he knew they would be  
21 mad?  
22 A. Yes.  
23 Q. How would you describe Jesse's  
24 personality?  
25 A. As moody.

1 Q. Would you describe him as being  
2 strong-willed?  
3 A. I would say yes.  
4 Q. Is he a man that made his own decisions?  
5 A. Yes.  
6 Q. Is he the type of guy that once he made  
7 up his mind to do something, he would do it?  
8 A. That's a tough question, sir. I can't  
9 elaborate on that. I don't know. I would be  
10 afraid to answer that one.  
11 Q. Okay. Well, you would say -- he was his  
12 own man?  
13 A. As I recall, yes.  
14 Q. Would you describe your brother as an  
15 intelligent person?  
16 A. Yes.  
17 Q. Was he well-read?  
18 A. Yes.  
19 Q. Did he like to keep up-to-date with  
20 current events?  
21 A. Yes.  
22 Q. Did he read newspapers?  
23 A. Yes.  
24 Q. Do you recall if he read books?  
25 A. I can't remember that.

1 Q. Well, after he left Crockett, did he like  
2 watching television?

3 A. I think he probably liked to, but his  
4 time was limited because he was a workaholic.

5 Q. Did Jesse ever say anything to you about  
6 the warnings on cigarette packages?

7 A. No.

8 Q. Did you ever talk to him about them?

9 A. Yes, indirectly.

10 Q. How do you mean "indirectly"?

11 A. Well, I would ask him to quit smoking.  
12 Tell him he should quit.

13 Q. And you would show him the warnings on  
14 the packs?

15 A. I would just tell him plain, in plain  
16 language, just to quit smoking, he should quit for  
17 his health.

18 Q. What would he say in response to you?

19 A. Said he was going to try, and that was  
20 always his last word.

21 Q. At some point did your brother develop a  
22 cough?

23 A. Yes.

24 Q. When was the first time that you noticed  
25 him having a cough?

1           A.    I can't remember the first time.  
2           Q.    Was it after he had left Crockett?  
3           A.    Yes.  
4           Q.    Was it during the time that you were  
5   residing in Portland?  
6           A.    Yes.  
7           Q.    Do you recall when, about, in that  
8   20-year period it would have been?  
9           A.    No.  
10          Q.    Had you talked to him about it?  
11          A.    Yes.  
12          Q.    What did you tell him?  
13          A.    I told him he should get it checked.  
14          Q.    How would he respond to you when you told  
15   him he should get it checked?  
16          A.    "I'm going to."  
17          Q.    Did you ever hear anybody else express  
18   concern about his cough?  
19               MR. DUMAS:   Line 9.  
20               THE WITNESS:   His wife.  
21   BY MR. DUMAS:  
22          Q.    Mayola?  
23          A.    Yes.  
24          Q.    When was the first time that you heard  
25   Mayola talk to Jesse about his cough?

1           A.    I can't remember.  
2           Q.    Was it during the time that you were  
3 living in Portland?  
4           A.    Yes.  
5           Q.    Did you hear her tell him that he should  
6 quit?  
7           A.    Several times.  
8           Q.    Because of his cough?  
9           A.    Well, even before he developed the  
10 severity of the cough she used to tell him that he  
11 should quit.  
12          Q.    So she had already told him he should  
13 quit before he developed this cough?  
14          A.    Yes.  
15          Q.    What do you mean when you say, quote,  
16 Jesse was a workaholic, end of quote?  
17          A.    He worked two jobs.  
18          Q.    Worked all the time?  
19          A.    Yes.  
20          Q.    Did he have much time for other things?  
21          A.    No, not that I remember.  
22          MR. DUMAS: I believe that concludes the  
23 deposition.  
24          MR. THOMAS: May we approach, Your Honor?  
25          THE COURT: Yes, of course.

1 (Discussion at the bench  
2 off the record.)

3 THE COURT: You can take a stretch,  
4 folks.

5 Actually, while your stretching,  
6 Ms. Dewees, I understand that you wanted to talk  
7 about changing seats. What do you mean?

8 JUROR DEWEES: If that's possible. I  
9 don't want to be in the corner anymore.

10 THE COURT: You don't want to be in the  
11 corner anymore?

12 JUROR DEWEES: No, I'm finding it  
13 frustrating being behind the TV and that thing.

14 THE COURT: Uh-huh.

15 JUROR DEWEES: It is your choice.

16 THE COURT: Oh, no. If it was my choice,  
17 we would be in a much better courtroom for this.  
18 There just isn't a much better place in the  
19 building, and I know these seats are very  
20 uncomfortable. Let me just throw the suggestion  
21 out, and it may be that someone is willing to  
22 trade seats with you. And that might solve the  
23 problem.

24 JUROR DEWEES: And we can do that on our  
25 own?

1 THE COURT: As long as you tell Mr. Rice.  
2 JUROR DEWEES: By Monday?  
3 THE COURT: Sure. I mean if you have got  
4 somebody who is willing to trade with you -- you  
5 don't think so?  
6 JUROR DEWEES: I haven't pursued it.  
7 THE COURT: Right. I'm just saying that  
8 if anybody is willing to trade, that would be  
9 fine, just let Mr. Rice know. And if not, there  
10 is a spare seat clear down at that end. You are  
11 welcome to take it. Okay?  
12 JUROR DEWEES: Okay.  
13 THE COURT: Have we resolved this issue?  
14 MR. DUMAS: Yes, Your Honor.  
15 THE COURT: We have a few more questions  
16 of Mr. Klein reading Mr. Williams' testimony.  
17 MR. DUMAS: One question, Your Honor.  
18 BY MR. DUMAS:  
19 Q. What did he say?  
20 A. He couldn't. He didn't know why, but he  
21 couldn't.  
22 MR. DUMAS: Thank you. That concludes  
23 the deposition.  
24 THE COURT: All right. And you have  
25 another reading?

1 MR. DUMAS: We have another reading.  
2 THE COURT: Who is that witness?  
3 MR. DUMAS: This will be Eddie Hill, the  
4 brother of Mayola Williams. Deposition was  
5 taken on August 25, 1998, in Texas.  
6 THE COURT: The reader is?  
7 MR. DUMAS: Nelson Koga.  
8 THE COURT: Spell your name, please.  
9 THE READER: K-O-G-A.  
10 THE COURT: Thank you. Come up to the  
11 witness chair, Mr. Koga.  
12 Okay. Mr. Dumas.  
13 MR. DUMAS: Page 4, Line 8.  
14

15 EDDIE HILL  
16 was thereupon called as a witness on behalf of the  
17 Defendant and, after having been first duly sworn,  
18 was examined and testified as follows:  
19  
20  
21  
22  
23  
24  
25

## DIRECT EXAMINATION

1  
2  
3 BY MR. DUMAS:  
4 Q. Can you state your full name for the  
5 record, please?  
6 A. Eddie Hill.  
7 Q. What is your date and place of birth?  
8 A. Pine Bluff, Arkansas, '39, August 20th.  
9 Q. How well did you know Jesse?  
10 A. I know him very well. He is my  
11 brother-in-law.  
12 Q. Did you grow up in Portland?  
13 A. Yes, I did.  
14 Q. When did you move from Portland to Texas?  
15 A. '79.  
16 Q. So you lived in Portland until 1979 and  
17 then moved to Texas; is that right?  
18 A. That's right.  
19 Q. Okay. Now, during the time that you  
20 lived in Portland, how much contact did you have  
21 with Jesse Williams?  
22 A. Oh, I had quite a bit of contact with  
23 Jesse.  
24 Q. Would it be on a daily basis?  
25 A. No.

1 Q. Weekly basis?

2 A. Probably a monthly basis or, you know,  
3 whenever we felt like getting together.

4 Q. Let's talk about you for a second. Are  
5 you a smoker?

6 A. I was.

7 Q. How long were you a smoker?

8 A. Oh, I smoked the first time for about 15  
9 years.

10 Q. That would have taken you into about the  
11 early '60s?

12 A. Yes. Something like that.

13 MR. DUMAS: I want to approach the  
14 witness, Your Honor.

15 BY MR. DUMAS:

16 Q. And then did you quit?

17 A. Yes. And after I learned about the --  
18 how the cigarette smoke, you know, affected one's  
19 body, my body, and how I would cough and spit up  
20 black stuff, I didn't want that in me.

21 Q. Did you -- what did you do to quit?

22 A. I just quit.

23 Q. Just like that?

24 A. Just like that.

25 Q. Cold turkey?

1 A. Cold turkey.  
2 Q. You saw it on TV, you saw a report about  
3 it?  
4 A. Yes.  
5 MR. THOMAS: What was the page and line  
6 on that, Counsel?  
7 MR. DUMAS: Page 60, Line 1.  
8 Strike the last question and answer,  
9 please.  
10 THE COURT: Sure. Go ahead.  
11 MR. DUMAS: Page 72, Line 11.  
12 BY MR. DUMAS:  
13 Q. You had no contact with Jesse --  
14 A. No, I didn't.  
15 Q. -- after you moved away from Portland?  
16 A. No, I didn't.  
17 Q. Did you ever speak to him?  
18 A. Not as I know of.  
19 Q. So essentially after 1979 you lost all  
20 contact with Jesse?  
21 A. I lost complete contact until my father  
22 died.  
23 Q. When was that?  
24 A. That was about four years ago.  
25 Q. Uh-huh.

1           A.    I think.  Something like that.  Three or  
2 four.  
3           Q.    Did your father die here in Portland?  
4           A.    Yes.  
5           Q.    Did you go back for the funeral?  
6           A.    I sure did.  
7           Q.    And that's when you saw Jesse again?  
8           A.    Uh-huh.  
9           Q.    Other than that time, have you had any  
10 other contact with Jesse at all?  
11          A.    No.  
12          Q.    Okay.  Was that the last time that you  
13 saw Jesse?  
14          A.    Yes.  
15          Q.    So the last time you saw him was  
16 approximately four years ago at your father's  
17 funeral?  
18          A.    Pardon?  
19          Q.    The last time you saw Jesse was  
20 approximately four years ago at your father's  
21 funeral; is that right?  
22          A.    Yes.  Uh-huh.  
23          Q.    Have you talked to him since then between  
24 the time when your father's funeral was and the  
25 time that Jesse died?

1 A. No.  
2 Q. Okay. How would you describe Mayola and  
3 Jesse's relationship?  
4 A. Great.  
5 Q. Do you know how long they were married  
6 for?  
7 A. A long time. Longer than I have been.  
8 Q. How long have you been married?  
9 A. 42 years.  
10 Q. That's a long time.  
11 A. Uh-huh.  
12 Q. Were there any periods during that time  
13 that Mayola and Jesse were married that they were  
14 separated?  
15 A. Never.  
16 Q. When did Jesse start smoking?  
17 A. When did he start?  
18 Q. Yes, sir.  
19 A. I couldn't tell you.  
20 Q. Was he smoking when you first met him?  
21 A. Yes, he was.  
22 Q. And you first met him when he was in the  
23 military, right?  
24 A. Yes.  
25 Q. What brand of cigarettes do you recall

1 Jesse smoking?

2 A. Jesse smoked -- when I first met him, I  
3 think he was smoking Pall Malls, and I don't know  
4 what the other brand that he smoked was. I think  
5 it was Pall Mall.

6 Q. Do you recall seeing Jesse smoke any  
7 other brands?

8 A. Yeah. He would switch sometimes, you  
9 know.

10 Q. What other brands do you recall him  
11 smoking?

12 A. Marlboro. He was smoking Marlboros.

13 Q. When did he switch to Marlboros?

14 A. I don't know.

15 Q. Was it after he had been smoking Pall  
16 Mall?

17 A. I don't know.

18 Q. Well, when you first met him, is it your  
19 testimony that he was smoking Pall Mall?

20 A. Yes, right.

21 Q. Okay. So at some point after he started  
22 smoking Pall Mall he was smoking Marlboros?

23 A. I would imagine so.

24 Q. Okay. You just don't recall when?

25 A. I never, you know -- I wasn't that close

1 to him --  
2 Q. Sure.  
3 A. -- to say where he stopped in, you  
4 know --  
5 Q. Do you recall -- other than Pall Mall and  
6 Marlboro, do you recall seeing Jesse smoke any  
7 other brands?  
8 A. No, not as I know of. I can't recall if  
9 he did. I can't recall.  
10 Q. Sure. Do you recall if he smoked  
11 filtered or unfiltered cigarettes?  
12 A. I don't know. Pall Mall I know wasn't a  
13 filtered cigarette, and I don't know about the  
14 Marlboro at that time, whether it was filtered or  
15 not.  
16 Q. Do you remember a time when he switched  
17 from unfiltered cigarettes to filtered cigarettes?  
18 A. I don't think he did, as far as I know.  
19 Q. How much did Jesse smoke per day? How  
20 many cigarettes per day would he smoke?  
21 A. Maybe a couple, two or three packs,  
22 something like that. He was a heavy smoker.  
23 Q. Was that consistent over time?  
24 A. He was a heavy smoker. That's all I can  
25 say.

1 Q. But did you notice any variance in the  
2 amount he smoked during the time that you knew  
3 him?

4 A. I wasn't around him that much.

5 Q. So his smoking two to three packs per day  
6 is based upon when you saw him prior to you  
7 leaving -- prior to you leaving to Texas; is that  
8 right?

9 A. He was a heavy smoker, and I know he went  
10 through more than one pack of cigarettes a day. I  
11 know that for sure.

12 Q. Did you ever see Jesse smoke a filtered  
13 cigarette?

14 A. Not as I know of.

15 Q. Were you and Jesse smoking Pall Mall at  
16 the same time?

17 A. Yes.

18 Q. When you quit in the early 1960s, is that  
19 when Jesse switched to Marlboro?

20 A. I don't know.

21 Q. Is the fact that you both smoked Pall  
22 Mall during the same timeframe is the reason that  
23 you remember that he smoked Pall Mall?

24 A. That's part of it.

25 Q. Did Jesse ever try to quit smoking?

1       A.    I'm sure that he did.  I -- I think he  
2    did.  
3       Q.    What did he do to try and quit smoking?  
4       A.    I do not know.  
5       Q.    Did you ever talk to him about quitting  
6    smoking?  
7       A.    I have never talked to Jesse really  
8    deeply about quitting cigarettes, because I knew  
9    he was going to smoke anyway.  
10      Q.    Why do you know that?  
11      A.    Because.  
12      Q.    Because why?  
13      A.    I knew Jesse.  
14      Q.    Can you explain that for me?  
15      A.    Well, it's just like it was a monkey on  
16    his back.  He couldn't quit.  
17      Q.    Did he ever tell you when he was going to  
18    quit smoking?  
19      A.    No, not really.  
20      Q.    Did you ever encourage him to quit  
21    smoking?  
22      A.    I might have.  
23      Q.    Did you ever tell him that you could quit  
24    cold turkey and that he could do the same?  
25      A.    Well, he knew that.

1 Q. Did you tell him?  
2 A. Yeah, I told him.  
3 Q. To your knowledge, did he ever ask any  
4 doctors or health professionals to help him quit  
5 smoking?  
6 A. To my knowledge, no.  
7 Q. And is it right that you have no  
8 knowledge of the methods that he used to try and  
9 quit?  
10 A. I have no knowledge of that.  
11 Q. Did Jesse ever tell you that he was  
12 addicted to cigarettes?  
13 A. No, he never told me that he was  
14 addicted.  
15 Q. Did he ever tell you that he couldn't  
16 quit?  
17 A. No, he didn't.  
18 Q. Did you ever talk to Jesse about the  
19 health effects of smoking?  
20 A. No, I didn't, because I figured he knew  
21 himself.  
22 Q. Because you knew?  
23 A. Yes.  
24 Q. And everybody new?  
25 A. Well, I would presume, if he read the

1 newspapers, listened to the news, radio, and  
2 listened to the people that he is around and all  
3 the coughing going on, he would be aware of it.

4 Q. Okay. How would you describe Jesse's  
5 personality?

6 A. A very strong person.

7 Q. Was he strong-willed?

8 A. Yes.

9 Q. Was he the kind of man that made his own  
10 decisions?

11 A. Yes.

12 Q. Was he the kind of man that once he made  
13 up his mind to do something he would follow  
14 through and do it?

15 A. If he felt like it, I would imagine so,  
16 yes, he did.

17 Q. Would you describe Jesse as an  
18 intelligent man?

19 A. Very.

20 Q. Was he well-read?

21 A. Very.

22 Q. To your knowledge, did he read  
23 newspapers?

24 A. Yes.

25 Q. Did he subscribe to any newspapers?

1 A. Yes.

2 Q. How would you describe Jesse's health  
3 before his diagnosis?

4 A. Well, the last time I saw Jesse, that's  
5 when my father died, Jesse looked to me -- do you  
6 want me to be honest?

7 Q. Yes, sir.

8 A. He looked like a picture of health.

9 Q. And that would have been in approximately  
10 1994?

11 A. This is when my father died. Jesse  
12 looked very well. In fact, I can recall him out  
13 there directing the boys how to play basketball  
14 and stuff like that. And that was my last memory  
15 of him.

16 Q. When you first saw Jesse smoking  
17 Marlboros, do you know if they were filtered or  
18 unfiltered?

19 A. Well, I cannot say, because -- you know,  
20 I have never known Jesse to smoke a filtered  
21 cigarette. So, to my knowledge, it wasn't  
22 filtered, but it could have been. I wasn't paying  
23 that much attention to it.

24 MR. DUMAS: That concludes the deposition  
25 reading, Your Honor.

1 THE COURT: Thank you, Mr. Koga.  
2 Jurors, that's all of your work for  
3 today. I told you I would let you know where we  
4 are in the schedule. Today is March 12th. We  
5 have been together three weeks, if you count  
6 February 22, the day you came in to start jury  
7 selection. We told you the trial would take  
8 four to five weeks. It is going to take five  
9 weeks.

10 I have worked with the lawyers. We have  
11 projected out how long the defense case is going  
12 to take, how long the plaintiff's rebuttal case  
13 will take. You will know then that there is an  
14 opportunity for argument. Plus, the plaintiff  
15 has the burden of proof. They argue first and  
16 last and the defense argues in between. And  
17 then I need to instruct you on the law that  
18 applies, and that's no small task either.

19 But the parties and I are committing to  
20 you that the case will be in your hands no later  
21 than two weeks from today, the morning of  
22 Friday, the 26th. I can't tell you how long it  
23 will take you to deliberate, and it is certainly  
24 possible that you will not finish in a day,  
25 which means you may be working Monday of the

1 following week. Or if you choose as a group to  
2 deliberate on Saturday, that will be your  
3 option, but I wanted you to know today that's  
4 our best estimate.

5 So if it makes a difference to you for  
6 purposes of planning that, you may still be  
7 deliberating on Monday, the 29th. I wanted you  
8 to have that information as soon as I had it.

9 Having just committed to you that the  
10 case will be in your hands on the 26th, I also  
11 cannot predict the future, and things happen, as  
12 you know.

13 The parties really are working very hard  
14 outside of your presence to get work done. We  
15 are working next Saturday, for example, the  
16 20th. We are having court outside your presence  
17 in order to maximize the time that is available  
18 to present material to you. And this is no  
19 small fete for anybody in the room; for you,  
20 anyone else. So I beg your indulgence.

21 I thank you for all of your attention.  
22 The last three weeks you have been marvelously  
23 attentive. There is more work to do. You have  
24 got the weekend off, so please leave your notes  
25 here. Don't discuss the case. Monday we need

1       you ready to go at nine o'clock. Thank you.

2

3                               (Open court; jury not  
4                               present:)

5       .

6               THE COURT: Okay. What else for the  
7       record?

8               MR. GAYLORD: Nothing for plaintiff.

9               MR. DUMAS: Nothing for defendant, Your  
10      Honor.

11              THE COURT: Okay. Very good.  
12                               (Evening recess.)

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25

1 STATE OF OREGON

2 ss.

3 County of Multnomah

4

5 I, Dennis Apodaca, Official Court Reporter of  
6 the Circuit Court of the State of Oregon, Eleventh  
7 Judicial District, certify that I reported in  
8 stenotype the foregoing proceedings in the  
9 above-entitled case.

10 I further certify that my stenotype notes were  
11 reduced to transcript form by Computer-Aided  
12 Transcription under my direction.

13 And I further certify that pages 1 through 152  
14 contain a full, true, and accurate record of my  
15 stenotype notes.

16 Dated this 12th day of March, 1999, at  
17 Portland, Oregon.

18

19

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21                      ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

Dennis Apodaca

22 Official Court Reporter

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